TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922.

No. [redacted] 20

SONNEBORN BROTHERS, A FIRM COMPOSED OF FERDINAND SONNEBORN, SIGMUND S. SONNEBORN, AND JULIUS SOTER, APPELLANTS,

vs.

[redacted] CHILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND MARK L. WILLINGTON, COMPTROLLER OF THE STATE OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

(28,022)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 665.

SONNEBORN BROTHERS, A FIRM COMPOSED OF FERDINAND SONNEBORN, SIGMUND B. SONNEBORN, AND JULIUS ROTEN, APPELLANTS,

vs.

C. M. CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND MARK L. WIGGINGTON, COMPTROLLER OF THE STATE OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1920.

1 & 2 *Caption.*

THE UNITED STATES OF AMERICA,
Western District of Texas:

Be it remembered, that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable W. R. Smith, United States District Judge presiding, and holding its sessions at Waco, Texas, which term began on the 15th day of November, 1920, and continued in session to and including the 23rd day of November, 1920, there came on to be heard and determined, among other causes pending on the docket, the following case:

In Equity.

Cause No. 64/305.

SONNEBORN BROTHERS
vs.
C. M. CURETON, Attorney General, et al.

3 UNITED STATES OF AMERICA,
Western District of Texas:

In the District Court of the United States for the Western District of Texas, Austin Division, June Term, 1919.

To the Honorable Judges of said court:

(1)

Ferdinand Sonneborn, a citizen of the State of Maryland, domiciled and residing in the City of Baltimore; Sigmund B. Sonneborn, a citizen of the State of Maryland, domiciled and residing in the City of Baltimore; Max Pick, a citizen of the State of New York, domiciled and residing in the City of New York, and Julius Roten, a citizen of the State of New York, domiciled and residing in the City of New York, as partners doing business under the firm name and style of Sonneborn Bros., bring this their bill in equity against C. M. Cureton, as Attorney General of the State of Texas, a citizen of the State of Texas, and an inhabitant of the western district of Texas, who resides in the City of Austin, and against Henry B. Terrell, as Comptroller of the State of Texas, a citizen of the State of Texas, and an inhabitant of the western district of Texas, who resides in the City of Austin.

(2)

The amount and matter in dispute herein, exclusive of interest and costs, exceeds in value the sum of three thousand dollars.

(3)

The plaintiffs claim herein that the certain Statute of the
4 State of Texas, known as Article 7377 of the Revised Civil Statutes of the State of Texas, which is also Section Nine of Chapter Eighteen of the General Laws of the State of Texas, approved May Sixteenth, Nineteen Hundred and Seven, Acts of Nineteen Hundred and Seven, page Four Hundred and Seventy Nine, in so far as said statute exacts from the plaintiffs as wholesale dealers in mineral oils refined from petroleum, a quarterly tax of two per cent of their gross receipts is in violation of Section Eight of Article One, of the Constitution of the United States, in that such tax is a burden on the commerce of plaintiffs between the several states and that said law violates the First Section of the Fourteenth Article of the Constitution of the United States, known as the Fourteenth Amendment thereto, in that the exaction of such tax from the plaintiffs will deprive them of property without due process of law, and deny to them the equal protection of the laws. The said Act is in words and figures substantially as follows:

"Art. 7377. Wholesale dealers in oils. "Wholesale dealers" defined.—Each and every company, individual, corporation or association created by the laws of this state, or any other state or nation, which shall engage in his own name, or in the name of others or in the name of its representatives or agents in this state in the business of wholesale dealers in coal oil, nap-tha, benzine or any other mineral oils refined from petroleum, shall make quarterly on the first day of January, April, July and October of each year, a report to the Comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this state of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to two per cent of said gross receipts and amount uncollected from said sales as shown by said report. A wholesale dealer, within the meaning of this article, is any individual, company, firm, partnership, corporation or association
who buys any of the articles hereinbefore mentioned, either
5 in his own name or in the name of others, or in the name of their representative or agent, and sells either in his name, or in the name of others, or in the name of their representatives or agents to any person, firm corporation or association to be sold again."

(4)

The plaintiffs represent that under their firm name and style of Sonneborn Bros., on or about the First day of January Nineteen Hundred and Ten, they established a business in the City of Dallas,

Texas, for the purpose of selling throughout the states of Texas, Oklahoma, Arkansas and New Mexico certain mineral oils refined from petroleum. These oils are known chiefly as Amalie 1-2-3, Non Carbon Cylinder Oil, Amalie Pennsylvania Oils; and in connection with the sale of said oils, the plaintiffs also sold greases, white oils and petrolatum. In connection with the sale of the goods aforesaid, the plaintiffs also sold Lapidolith Floor Hardener, Cemcoat, Enamel-Like Coating Hydrocide Damp Proofer, paints for all purposes, and an article Sonnotint of the same nature. And plaintiffs under their said firm name and style, have continued to conduct the said business in the State of Texas, at their establishment opened as aforesaid at Dallas, and use in connection therewith a public warehouse in the City of San Antonio, Texas.

(5)

During the time they have been engaged in the conduct of their business, as aforesaid, and up to the Eleventh day of April, Nineteen Hundred and Nineteen, the plaintiffs have sold within the State of Texas, goods, wares and merchandise, consisting chiefly of mineral oils refined from petroleum from which they have received as gross receipts the sum of, to-wit, Eight Hundred and Sixty Thousand, Eight Hundred and One Dollars and Fifty Cents, two per cent of which is the sum of to-wit, Seventeen Thousand and Two Hundred and Sixteen Dollars and Three Cents. The gross receipts, aforesaid were received quarterly, as follows:

6

1910.

January to March, inclusive	$1,293.03
April to June inclusive	5,047.22
July to September inclusive	7,492.67
October to December inclusive	6,778.53

1911.

January to March inclusive	$6,577.37
April to June inclusive	8,000.26
July to September inclusive	9,921.86
October to December inclusive	11,014.62

1912.

January to March inclusive	$12,364.06
April to June inclusive	13,228.04
July to September inclusive	15,935.20
October to December inclusive	14,877.61

1913.

January to March inclusive	$21,355.45
April to June inclusive	19,300.75
July to September inclusive	24,709.99
October to December inclusive	17,133.52

1914.

January to March inclusive	$15,414.89
April to June inclusive	19,832.25
July to September inclusive	19,702.93
October to December inclusive	16,074.38

1915.

January to March inclusive	$16,856.23
April to June inclusive	21,673.56
July to September inclusive	25,608.84
October to December inclusive	31,229.80

1916.

January to March inclusive	$31,506.58
April to June inclusive	22,881.91
July to September inclusive	37,106.88
October to December inclusive	33,952.10

1917.

January to March inclusive	$39,946.85
April to June inclusive	39,453.03
July to September inclusive	57,404.83
October to December inclusive	35,019.29

1918.

January to March inclusive	$39,390.83
April to June inclusive	53,794.18
July to September inclusive	57,386.69
October to December inclusive	28,691.93

1919.

January to March inclusive	$29,182.28
April first to Eleventh inclusive	8,661.06

7 (6)

The plaintiffs have conducted their business in the State of Texas through a manager and salesmen who travel from the Dallas office for the purpose of taking orders, except that one of plaintiffs' salesmen travels from San Antonio for the same purpose. These salesmen solicit orders in Texas, Louisiana, Arkansas, Oklahoma, New Mexico and occasionally in other adjacent states. Their orders when taken are sent in to the office at Dallas for acceptance, and when accepted they are usually approved by the manager at Dallas, but sometimes when the sale is a large one the matter of credit is passed

on by the credit department of the plaintiffs, who maintain an office in the City of New York for that and other purposes. Orders are also received at the Dallas office direct from customers in Louisiana, Oklahoma, Texas and New Mexico. When these orders are accepted they are either filled by shipments from Dallas or from San Antonio, or direct from the factories or refineries of L. Sonneborn Sons, Incorporated, situated at Nutley in the State of New Jersey, and at Petrolia, in the State of Pennsylvania, from whom the plaintiffs purchase all of the oils and petroleum products which they sell on orders received at Dallas or at San Antonio.

The plaintiffs neither manufacture in Texas, nor buy in Texas, any mineral oils or products refined from pertoleum, or any other goods, wares or merchandise for sale by them. The plaintiffs only sell on orders received at Dallas or at San Antonio, goods, wares and merchandise which have been purchased by them in other states than Texas, and shipped to the customers direct from the place where purchased by the plaintiffs, or which have been shipped to the plaintiffs from the place of purchase, destined to Dallas or to San Antonio, and there held by the plaintiffs in the original package, unbroken until resold by them, except as hereinafter shown. That the oils which are the chief items from which plaintiffs derive gross receipts, are shipped in sealed drums, wood barrels or cases
8 containing one gallon and five gallon tin cans of oil. The plaintiffs have no storage tanks in Texas, and do not receive any oil in Texas in tank cars; nor do they, in Texas, fill any drums, barrels or cans with oil, but they sell in the original containers, sealed at the factory, and sold by them to their customers with the assurance that the merchandise is in the exact condition and sealed as when it left the factory.

The plaintiffs very infrequently, for the accommodation of a customer, vary their method of doing business to the extent of pouring out of a drum, oil into a ten gallon milk can, which is then taken and poured into the tank of the customer, but this practice does not occur more than once or twice during a month, and the sales so made will constitute far less than one half of One per cent of the plaintiff's business in Texas, and the gross revenue arising therefrom will constitute far less than one half of one per cent of the gross receipts of the plaintiffs' business.

(7)

When a sale is made by the plaintiffs on an order received at Dallas or at San Antonio, a record of the sale is made in ledgers kept by the plaintiffs at Dallas and at San Antonio, in order to enable plaintiffs promptly to render statements to customers. Copies of all invoices made at Dallas or at San Antonio to plaintiffs' customers are daily sent to the plaintiffs' New York office, where the books of account of the plaintiffs are kept and all trial balances are made. The purpose of keeping these records at Dallas and at San Antonio is merely to enable the plaintiffs promptly to give information to their customers, and thereby avoid the delay which would be incident to

securing this information from their New York office. All of the information pertaining to the salesmen's commissions, profits made and data from the books, other than conditions of customers'
9 accounts, is obtainable only at the New York office. All funds received by plaintiffs at their Dallas office are deposited in a bank at Dallas to the credit of plaintiffs, subject to checks thereon by plaintiffs only drawn at their New York office, and all funds received by the plaintiffs at San Antonio, are deposited in a bank there to the credit of plaintiffs, subject to checks thereon by plaintiffs only drawn at their New York office, and no agent of plaintiffs who lives in Texas has authority to check against either of said accounts, and there is no other bank in Texas in which is deposited receipts from the plaintiffs' business conducted in Texas, or any other funds of plaintiffs.

(8)

The plaintiffs rent one floor in a four story building at Dallas, which they use as an office and storage room, and they use for the storage of their goods at San Antonio space in a public warehouse conducted there. The plaintiffs have never owned, and do not now own real estate in the State of Texas, nor any other property situated there than money, except the credits which from time to time arise in said banks in course of transmission to the plaintiffs in New York, such merchandise as they import into the state and hold in unbroken packages, (except as hereinbefore stated) for resale on orders taken as hereinbefore stated, one Ford car and office furniture and fixtures.

On their said property situated in Texas, the plaintiffs have paid ad valorem taxes, as follows:

City Taxes.

1911	$52.78
1912	69.12
1913	52.80
1914	35.15
1915	75.05
1916	69.35
1917	76.55
1918	166.73, and

State and County Taxes.

1912	$31.09
1913	28.00
1914	29.00
1915	52.80
1916	34.96
1917	51.47
1918	53.04

10 (9)

The laws of the State of Texas now provide, and since the year Nineteen Hundred and Seven have provided, that every individual, company, corporation, firm or association which is required to pay a gross receipts tax, shall for every quarter of the year succeeding the quarter during which business was commenced make a report to the Comptroller of the State of Texas of the business of the preceding quarter; and every wholesale dealer in oils is required by said law to make quarterly, on the First day of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual, or of the president, treasurer or superintendent of such company, corporation or association as may be engaged in such business, showing the gross amount collected or uncollected from any and all sales made within the state of Texas of mineral oils and petroleum products during the quarter next preceding. And the said law also provides that such individual, company and association at the time of making said report shall pay to the treasurer of the State of Texas a tax called an occupation tax for the quarter beginning on said date, equal to two per cent of said gross receipts, and amount uncollected from said sales, as shown by said report. And said law further provides that any person, company, corporation or association, or any receiver or receivers failing to make a report after thirty days from the date when said report is required by this chapter to be made, shall forfeit and pay to the State of Texas a penalty of not to exceed one thousand dollars. And said law further provides, that any person, company, corporation or association or any receiver or receivers, failing to pay any tax after thirty days from the date when said tax is required by law to be paid, shall forfeit and pay to the State of Texas a penalty of ten per cent upon the amount of such tax.

11 And said law further provides that no individual failing to pay such tax shall do business in the State of Texas until such tax is paid.

(10)

The plaintiffs have not made the reports required by said gross receipts tax act, neither have they paid the tax purported to be levied by said gross receipts tax law, and thirty-seven quarterly returns, required by said Act, have not been made by the plaintiffs. For the failure to make these returns or reports the purported Act provides penalties aggregating not to exceed thirty-seven thousand dollars; and thirty-seven payments of the gross receipts tax, as provided by said purported law, have not been made by the plaintiffs, for the failure to make which payments the said purported Act provides penalties to the amount of ten per cent of the tax due, and the said gross receipts tax, itself, for the period covered by said quarters aggregates seventeen thousand, two hundred and sixteen dollars and three cents.

(11)

The laws of the State of Texas make no provision for suing the State nor any officer of the State for recovery of a tax paid under protest.

(12)

Under the said pretended law of the State of Texas the Attorney General is required to bring suits in the name of the State of Texas for the recovery of the gross receipts tax, and the penalties aforesaid, and by said law the Comptroller of Public Accounts, if he believes that the plaintiffs have omitted to make a full return of their gross receipts, is required to report the ommission in writing to the Governor. Whereupon, under said law, the Governor is required to immediately cause an investigation to be made into the books, papers and documents of the plaintiffs, or other records or evidence showing such ommission, and when such ommission has occurred the Comptroller is required to call upon the plaintiffs for a report for each quarter, and when the plaintiffs shall fail, as they will
12 fail, to make the reports the law denounces them as guilty of a criminal offense of the grade of a misdemeanor for failure to make each such report, and subjects them to prosecution therefor in the Criminal Court of Travis County. Under said law the said Comptroller, as he is required to do, has demanded of the plaintiffs that they make quarterly reports from the time when they began business in Texas, that is to say, during the first quarter of the year Nineteen Hundred and Ten, and when the plaintiffs refuse to make such report, and they will refuse and omit to make the same, the Comptroller of Public Accounts will report such refusal and omission to the Attorney General of the State of Texas, who will thereupon institute a suit or suits against the plaintiffs, for the collection of said penalties, and the said Comptroller will prosecute the plaintiffs for such refusal and omission to make a report for each quarter, and subject the plaintiffs to repeated prosecutions in the Criminal Court of Travis County. And plaintiffs will be subjected, as well, to a civil suit, or suits, for the collection of said illegal exactions of purported gross receipts taxes, and to restrain them from doing business in Texas until they shall pay said illegal demands for two per centum upon their quarterly gross receipts as wholesale dealers in mineral oils and petroleum products.

(13)

The plaintiffs have no adequate remedy at law for the threatened trespasses and wrongs about to be perpetrated upon them under the guise of said gross receipts tax law, and which they will suffer at the hands of the defendants herein unless protected by the gracious writ of injunction issued out of this Honorable Court.

(14)

That the Honorable W. P. Hobby is Governor of the State of Texas.

(15)

Wherefore, premises considered, and tendering such bond as the Court may require, the plaintiffs pray that after due notice
13 to the defendants and to His Excellency, the Governor of Texas, and the assembling of a special court, as provided by law, and a hearing, this court issue a preliminary injunction, enjoining and restraining defendant C. M. Cureton Attorney General, from instituting any suit or suits to collect the said gross receipts tax or penalties from the plaintiffs or to restrain plaintiffs from doing business in Texas until said purported tax is paid, and enjoining and restraining the said Henry B. Terrell, as Comptroller of Public Accounts, from calling on plaintiffs to make any report or reports of their gross receipts as wholesale dealers in mineral oils and petroleum products, and from prosecuting the plaintiffs for failure to make any report or reports in respect to their business as wholesale dealers in mineral oils and petroleum products, or for making any alleged false reports of their products, or for doing, refusing to do, or omitting to do any act required of them by said purported gross receipts law. And plaintiffs pray that a subpœna issue in terms of law herein, to each of said defendants, C. M. Cureton, Attorney General and Henry B. Terrell, Comptroller, commanding them, and each of them to answer herein, but not under oath an answer under oath being expressly waived. And they pray that on a final hearing the said temporary injunction be perpetuated and the plaintiffs be awarded a decree against said defendants herein, and against each of them, granting a perpetual injunction in terms of said restraining order. And the plaintiffs pray for costs, and for such other relief as they may be entitled to according to the principles of equity. And as in duty bound the plaintiffs will ever pray.

SONNEBORN BROS.,
(Signed) By ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

(Signed) J. M. McCORMICK,
Of Counsel.

14 UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

The undersigned, Ferdinand Sonneborn, being first duly sworn, states on oath, that he is one of the members of the firm of Sonneborn Bros., plaintiffs in the foregoing bill of complaint, and that he

has read the same and knows the contents thereof, and that within his knowledge the facts therein stated are true in substance and in fact; and further affiant saith not.

(Signed) FERDINAND SONNEBORN.

Subscribed and sworn to by said Ferdinand Sonneborn, before me, on this the 16th day of June, A. D. 1919.

[SEAL.] (Signed) HENRY ZEVIE,
Notary Public within and for the County of New York and State of New York.

(Endorsed as follows, to-wit:) No. 64/305 Equity. Sonneborn Bros., Plaintiffs, vs. C. M. Cureton, Attorney Gen'l and Henry B. Terrell, Comptroller, Defendants. Original Bill. Filed June 21, 1919. D. H. Hart, Clerk. By A. B. Coffee, Deputy. Filed November 23rd, A. D. 1920. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

15 In the District Court of the United States for the Western District of Texas, Austin Division.

In Equity.

SONNEBORN BROTHERS, Plaintiffs,

against

C. M. CURETON, as Attorney General of the State of Texas, and H. B. TERRELL, as Comptroller of the State of Texas, Defendants.

Answer of Defendants.

16 To the honorable judge of the district court of the United States for the Western District of Texas, sitting in equity:

The Answer of the Above-named C. M. Cureton, Attorney General of Texas, and H. B. Terrell, Comptroller of the State of Texas, Defendants, to the Bill of Complaint Exhibited Against Them by the Above-named Complainants.

These defendants now and at all times hereinafter, saving and reserving to themselves all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiences in the complainants' said bill of complaint contained for answer hereunto or unto so much or such parts thereof as these defendants are advised that it is material or necessary for them to make answer unto, answer same.

I.

These defenedants will accept as true the statement of plaintiffs that Ferdinand Sonneborn is a citizen of the State of Maryland, that Sigmund V. Sonneborn is a citizen of the State of Maryland,

that Max Pick is a citizen of the State of New York and that these men are partners doing business under the firm name and style of "Sonneborn Brothers" and that C. M. Cureton is the Attorney General of the State of Texas and that H. B. Terrell is the Comptroller of Public Accounts of the State of Texas, and reside in the City of Austin within the Western District of Texas.

II.

These defendants admit that the amount and matter in dispute herein, exclusive of interests and costs, exceeds in value the sum of Three Thousand Dollars.

17 III.

These defendants deny that Article 7377, Revised Civil Statutes of the State of Texas, which was Section 9, Chapter 18, General Laws of the State of Texas, approved May 16, 1907, Acts of 1907, page 479, in so far as said statute exacts from the plaintiffs as wholesale dealers in mineral oils refined from petroleum a quarterly tax of two per cent of their gross receipts on sales made within the State of Texas, is in violation of Section 8 of Article One of the Constitution of the United States.

These defendants allege that the tax exacted by said Article 7377 is a tax on all sales made within this State by each and every company, individual, corporation or association created by the laws of this State or any other State or Nation which shall engage in his own name or in any name of its representatives or agents in this State in the business of wholesale dealers in coal oil, naptha, benzine or any other mineral oils refined from petroleum; and they deny that such taxes are a burden upon the commerce of the plaintiffs between the several States.

These defendants deny that said Article 7377 is in violation of the first section of the Fourteenth Article of the Constitution of the United States, known as the Fourteenth Amendment thereto, and deny that the exaction of the tax provided for in said article from the plaintiffs will deprive them of property without due process of law, or deny them equal protection of the law.

IV.

These defendants will accept as true statements made by plaintiffs in the fourth paragraph of their bill of complaint.

V.

These defendants state that they do not know whether the statement of the plaintiffs made in the fifth paragraph of their
18 bill of complaint as to the value of the goods, wares and merchandise, consisting chiefly of mineral oils from refined petroleum sold within the State of Texas, is accurate and correct, and of this they demand that strict proof be made.

VI.

These defendants state *they* they do not know whether the sixth paragraph of plaintiffs' bill of complaint, alleging the method by which sales are made and in what States made, nor whether plaintiffs maintain an office in the City of New York and, if they do maintain an office in that city, these defendants do not know for what purpose nor do these defendants know how the orders received at the Dallas office of plaintiffs are filled nor do these defendants know what quantity of orders received at the Dallas office are filled by shipments from Dallas or from San Antonio, nor what quantity of said orders are filled from places outside of the State of Texas.

These defendants state that they do not know whether plaintiffs manufacture within the State of Texas, or whether they buy within the State of Texas any mineral oils or products refined from petroleum or any other goods, wares, merchandise for sale by them. These defendants state that they do not know whether plaintiffs only sell on orders received at Dallas and San Antonio goods, wares and merchandise which have been purchased by them in other States than Texas, nor how orders received and accepted by plaintiffs are filled, nor whether the orders received by plaintiffs at Dallas or at San Antonio are filled by shipment of goods, wares and merchandise which have been purchased by plaintiff in other States than Texas and shipped to the customer direct from the place where purchased or which have been shipped to the plaintiffs from the place of purchase destined to Dallas or San Antonio and there held by
19 the plaintiffs in the original package unbroken until resold by them. These plaintiffs further state that they do not know whether the chief items derived from the gross receipts are shipped in sealed drums, wood barrels or cases containing one gallon and five gallon tin cans of oil.

These defendants further state that they do not know whether plaintiffs have any storage tanks in Texas, and do not know whether plaintiffs receive any oil in Texas in tank cars, nor do they know whether plaintiffs fill any drums, barrels or cans with oil, nor do they know whether plaintiffs sell to their customers in the State of Texas in the original containers sealed at the factory and sold by them to their customers with the assurance that the merchandise is in the exact condition and sealed as when it left the factory. These defendants further state that they do not know what per cent of the business in Texas is derived from the sale of goods, wares and merchandise sold other than in their original containers, but accept as true plaintiffs' statement that they do fill some orders from customers by pouring oil out of drums into ten gallon cans, transporting the same therein and pouring the oil therefrom into the customers' tanks. These defendants demand that strict proof be made of all facts alleged in the sixth paragraph of plaintiffs' bill of complaint.

VII.

These defendants state that they do not know how the books of the plaintiffs at their Dallas and San Antonio places of business are kept, nor do they know that copies of all invoices made at Dallas and San Antonio to plaintiffs' customers are daily sent to plaintiffs' New York office, neither do they know if the books of account of plaintiffs are kept and all balances made at plaintiffs' New York office; neither do they know the purpose of plaintiffs in keeping
20 their books and records at Dallas and San Antonio, neither do they know what disposition is made of the funds received by the plaintiffs at their Dallas and San Antonio office; therefore these defendants demand that strict proof be made of all allegations contained in the seventh paragraph of plaintiffs' bill of complaint.

VIII.

These defendants state that they do not know how much floor space is used by plaintiffs at their place of business in Dallas and San Antonio, neither do these defendants know how much real estate, if any, the plaintiffs own in the State of Texas, nor do they know how much property, if any, other than real estate, that plaintiffs own that is situated in the State of Texas, neither do they know whether they hold their merchandise in their Dallas and San Antonio places of business in unbroken packages, nor do they know what amount, if any, plaintiffs have paid since coming to Texas in ad valorem taxes; therefore these defendants demand that strict proof be made of all allegations contained in paragraph eight of plaintiffs' complaint.

IX.

These defendants admit the correctness of all the statements made in paragraph nine of plaintiffs' bill of complaint.

X.

These defendants admit that plaintiffs have failed to make many of the reports required by this law, but how many they are unable to state.

These defendants state that they do not know the exact amount due by plaintiffs to the State of Texas by reason of their having failed to pay the tax levied by the gross receipts tax law of this State, nor do they know the exact amount of penalties due the State from plaintiffs by reason of their having failed to comply with the provisions of the gross receipts tax law of this State.

21 These defendants allege that plaintiffs on or about the first day of January, 1919, paid to the State of Texas the sum of $381.56, representing a tax of two per cent upon $19,078, being the estimate of receipts of Sonneborn Brothers for wholesale business of oil done by them in Texas for the months of July, August and September, 1918; and that they filed an additional statement for the

above months in the Comptroller's Department of the State of Texas on January 25, 1919, showing additional receipts in the amount of $3,169.08, paying a two per cent tax thereon, amounting to $62.00; for these two payments, Sonneborn Brothers hold receipts Numbers 1140 and 1141, issued by the Comptroller's Department of the State of Texas. These receipts show them to be paid in advance for the quarter beginning October 1, 1918.

On or about February 27, 1919, Sonneborn Brothers filed a statement showing their receipts for the months of October, November and December, 1918, to be $3,100.77, paying a tax of two per cent thereon, in the amount of $62.00, for which they hold receipt Number 1474, issued by the Comptroller's Department of the State of Texas, showing them to be paid in advance for the quarter beginning January first, 1919.

XI.

These defendants admit the correctness of plaintiffs' statement contained in paragraph eleven of their bill of complaint.

XII.

These defendants deny that the Attorney General of the State of Texas is charged by this law with any special duty to bring suits for the recovery of this gross receipts tax, and state that his
22 duties in respect thereof are merely the general duties imposed upon him by the Constitution and general laws of the State of Texas to represent the interests of the State in suits brought for or against it. The defendants admit that said gross receipts tax law provides that, "the penalties provided for by this Act shall be recovered by the Attorney General in a suit brought by him in the name of the State of Texas."

Defendants admit that by the terms of said law the Comptroller, if he has reason to believe or does believe that any individual company, corporation, association, receiver or receivers, subject to the provisions of the Act, has made a false return or has failed or omitted to make a full return of gross receipts, or other statement of business done, required by any of the provisions of this Act, he shall report the same in writing to the Governor, and it shall be the duty of the Governor to immediately require the Revenue Agent of the State of Texas to examine any books, papers or documents, or other records or evidence showing or tending to show such unlawful act or omission."

Defendants deny that the Comptroller is required to call upon the plaintiffs for a report for each quarter and that when the plaintiffs shall fail to make the reports the law denounces them as guilty of a criminal offense of the grade of a misdemeanor for failure to make each such report, and subjects them to prosecution therefor in the criminal court of Travis County.

Defendants state that by said law it is required that said Revenue Agent, "after checking the report made with such books, papers, documents or other records or evidence," shall make his report to

the Comptroller and that, if it appears from said report "that any false or incorrect return has been made, or that any individual, or the president, treasurer or superintendent of any company, corporation or association, or any member of any firm required by
23 this Act to make reports has omitted to make a full return, as required by law, then the Comptroller shall notify such individual, or the president, treasurer or superintendent of any company, corporation or association, or receiver, or receivers, of any company, corporation or association, or any member of any firm, to make forthwith an additional or supplemental report, and if any such individual, or the president, treasurer or superintendent of any company, corporation or association, or any member of a firm, or any receiver or receivers of any company, corporation or association making said original report shall fail or refuse to make said additional report or supplemental report, he shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than two hundred nor more than five hundred dollars."

That by said law it is also provided that if it appears from the report of the State Revenue Agent, or if the Comptroller has reason to believe, or does believe, that any individual, or any president, treasurer or superintendent or any company, corporation or association, or any receiver of any corporation or association, or any member of any firm, has wilfully and deliberately made a false report, the Comptroller shall report the matter to the grand jury of Travis County.

That the foregoing are the only duties in respect to said law and the enforcement thereof specially charged upon the Comptroller.

That the Comptroller of Public Accounts is not charged by said law with any duty to demand and is not authorized to demand of plaintiffs, or either of them, to make any quarterly report, and, if plaintiffs or any one of them should refuse or omit to make such quarterly report, the Comptroller of Public Accounts is not authorized or required by said law to report such refusal or omission to the Attorney General of the State of Texas, and is not authorized
24 or empowered to prosecute and can not and will not prosecute the plaintiffs for such refusal and omission to make a report for each quarter and will not and can not subject the plaintiffs to repeated prosecutions in the criminal court of Travis County.

Defendants further state that neither of them can or will, under the provisions of this law or of any existing law of the State of Texas, prosecute plaintiffs, or either of them, for failure to make the quarterly reports required of them by this gross receipts tax law. No such prosecution is provided by this law. Defendants state that this gross receipts tax law merely provides that if any person, company, corporation or association, or any receiver or receivers, failing to make report for thirty days from the date when said report is required by this Act to be made, shall forfeit and pay to the State of Texas a penalty of not exceeding one thousand dollars, which shall be recovered by the Attorney General in a suit brought by him in the name of the State of Texas.

That neither the Attorney General nor the Comptroller can or

will under said law commit any specific wrong to or trespass upon plaintiffs or their property.

XIII.

These defendants deny that plaintiffs have no adequate remedy at law, and they deny that plaintiffs are threatened with any trespasses or wrongs and deny that they will suffer in any way at the hands of the defendants herein, unless protected by writ of injunction issued out of this Honorable Court.

XIV.

These defendants admit that Honorable W. P. Hobby is the Governor of the State of Texas.

XV.

These defendants allege that plaintiffs are engaged in an
25 intra-state business in making sale of their goods, wares and merchandise in the State of Texas, and are subject to the payment of the tax exacted by the Article 7377, Revised Civil Statutes of Texas, even though the goods so sold are delivered in the unbroken packages in which they were received by plaintiffs from States other than Texas.

XVI.

These defendants deny that complainants are entitled to any relief whatsoever or any part of the relief in said bill of complaint demanded, and allege that complainants have no standin*f* in this Court or in any court of equity.

XVII.

And these defendants pray in all things the same benefits and advantages of their answer as if they had pleaded or demurred said bill of complaint.

XVIII.

And these defendants deny all and all manner of unlawful acts whatsoever whereof they are in any wise by the said bill of complaint charged, all of which matters and things these defendants are ready and willing to prove as this Honorable Court shall direct. Therefore

these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) H. B. FERRELL,
Comptroller of Public Accounts of the State of Texas.

(Signed) C. M. CURETON,
In Propria Persona and as Attorney General of the State of Texas.
(Signed) E. F. SMITH,
Assistant Attorney General, State of Texas.
(Signed) JNO. C. WALL,
Assistant Attorney General, State of Texas.

26 (Endorsed as follows, to-wit:) No. 64/305, Equity. Sonneborn Brothers vs. C. M. Cureton, Attorney General of the State of Texas, and H. B. Terrell, Comptroller of the State of Texas. Defendant's Original Answer. Filed July 12, 1919, at 4 o'clock P. M. D. H. Hart, Clerk. Filed 23rd day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

27 In the District Court of the United States for the Western District of Texas, Austin Division.

No. 305. Equity.

SONNEBORN BROTHERS, a Copartnership Composed of Ferdinand Sonneborn, Sigmund B. Sonneborn, Max Pick, and Julius Roten,

versus

C. M. CURETON, Attorney General of the State of Texas, and HENRY B. TERRELL, Comptroller of the State of Texas.

At New Orleans, Louisiana, in Chambers, on the 28th day of February, A. D. 1920, this cause came on to be heard, upon the application of plaintiffs for an interlocutory injunction, before the undersigned, William R. Smith, United States District Judge for the Western District of Texas, and the Honorable William I. Grubb, United States District Judge for the Northern District of Alabama, and the Honorable Richard W. Walker, United States Circuit Judge for the Fifth Circuit, called to assist at the hearing and in the determination of said application under the provisions of Section 266 of the Judicial Code.

Whereupon, upon hearing the pleadings read, the evidence and argument of counsel, and after due consideration thereof, and for the reasons and upon the grounds stated in the opinion of the Court filed in this cause, it is ordered that the application of plaintiffs for an interlocutory injunction in this case be, and the same is hereby,

denied; to which ruling and order of the Court, the plaintiffs then and there excepted, and prayed an appeal to the Supreme Court of the United States, which is hereby allowed in terms of the law.

Witness our hands at New Orleans, Louisiana, this the 28th day of February, A. D. 1920.

(Signed) W. R. SMITH,
United States District Judge.

(Signed) R. W. WALKER,
United States Circuit Judge.

(Signed) W. I. GRUBB,
United States District Judge.

(Endorsed as follows, to-wit:) United States District Court, Western District of Texas, Austin Division. No. 64/305, Equity. Sonneborn Brothers vs. C. M. Cureton et al. Order denying plaintiffs'
28 application for interlocutory injunction. Hearing at New Orleans Feb. 28, 1920. Filed and entered at Austin, Texas, April 22, 1920. D. H. Hart, Clerk. Filed at Austin, April 22, 1920. A. B. Coffee, Deputy. Eq. Order Book, p. 98. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

29 In the District Court of the United States for the Western District of Texas, Austin Division.

In Equity.

No. 305.

SONNEBORN BROS.

vs.

C. M. CURETON, Attorney General, and H. B. TERRELL, Comptroller.

This is a suit in equity by Sonneborn Bros., a firm composed of citizens of Maryland and New York, for an injunction to restrain the Attorney General and the Comptroller of the State of Texas from instituting any suit or suits to collect from plaintiffs taxes levied by Article 7377 Revised Statutes of Texas, or to restrain plaintiffs from doing business in Texas until such tax is paid, and from calling on plaintiffs to make reports of their gross receipts as wholesale dealers in mineral oils and petroleum products, and from prosecuting plaintiffs for failure to make any report or reports in respect to their business as wholesale dealers in mineral oils and petroleum products, or for making any alleged false reports of their products, or for doing, refusing to do, or for omitting to do any act required of them by said article 7377 of the Statutes of Texas, and by other articles of the Statutes of said State providing for the administration and enforcement of said Article.

The article of the State statutes here referred to read- as follows:

"Art. 7377. Wholesale Dealer in Oils: 'Wholesale Dealer' Defined—Each and every individual, company, corporation or asociation created by the laws of this State, or any other State or Nation, which shall engage in his own name, or in the name of others, or in the name of its representatives, or agents in this State in the business of wholesale dealers in coal oil, nap-tha, benzine or any other mineral oils refined from pertoleum, shall make quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation, or association, showing the gross amount collected and uncollected from any and all sales made within this State of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the State of Texas an occupation tax for the quarter beginning on said date equal to two per cent of said gross receipts and amount uncollected from said sales as shown by said report. A wholesale dealer, within the meaning of this article, is an individual, company, firm, partnership, corporation or association who buys any of the articles hereinbefore mentioned, either in his own name or in the name of others, or in the name of their representative or agent, and sells same either in his name, or in the name of others, or in the name of their representatives or agents, or any person, firm, corporation or association, to be sold again."

"Art. 7386. Penalty for Failure to Report.—Any person, company, corporation or association, or any receiver or receivers, failing to make report for thirty days from the date when said report is required by this chapter to be made, shall forfeit and pay to the State of Texas a penalty of not exceeding one thousand dollars."

"Art. 7387. Penalty for Failure to Pay Tax.—Any person, company, corporation or association, or any receiver or receivers, failing to pay any tax for thirty days from the date which said tax is required by this chapter to be paid, shall forfeit and pay to the State of Texas a penalty of ten per cent upon the amount of such tax."

"Art. 7388. Penalties to be Recovered by Attorney General.—The penalties provided for by this chapter shall be recovered by the Attorney General in a suit brought by him in the name of the State of Texas; and venue and jurisdiction of such suit is hereby conferred upon the courts of Travis County, Texas."

"Art. 7389. Permit not Granted Until Tax is Paid.—No individual, company, corporation or association, failing to pay all taxes imposed by this chapter, shall receive a permit to do business in this State, or continue to do business in the State, until the tax hereby imposed is paid. The receipt of the Treasurer of the State of Texas shall be evidence of the payment of such tax."

"Art. 7390. Tax in Addition to All Other Taxes.—Except as herein stated, all taxes levied by this chapter shall be in addition to all other taxes now levied by law; provided, that nothing herein shall

be construed as authorizing any county or city to levy an occupation tax on the occupations and business taxed by this chapter."

"Art. 7391. Comptroller May Require Additional Reports.—If for any reason the Comptroller of Public Accounts is not satisfied with any report from any such person, company, corporation, co-partnership or association, he may require additional or supple-
31 mental reports containing information and data upon such matters as he may need or deem necessary to ascertain the true and correct amount of all taxes due by any such person, firm or corporation. Every statement or report required by this chapter shall have affixed thereto the affidavit of the president, vice-president, secretary or treasurer of the person, corporation, co-partnership or association, of one of the persons or members of the partnership making the same, to the effect that the statement is true. The Comptroller shall prepare blanks to be used in making the reports required by this chapter."

"Art. 7392. Revenue Agent to Examine Books, etc.—If the Comptroller has reason to believe, or does believe, that any individual, company, corporation, association, receiver or receivers, subject to the provisions of this chapter, has made a false return or has failed or omitted to make a full return of gross receipts, or other statement of business done, required by any of the provisions of this chapter, he shall report the same in writing to the Governor; and it shall be the duty of the Governor to immediately require the revenue agent of the State of Texas to examine any books, papers, documents, or other records or evidence showing or tending to show such unlawful act or omission. Said revenue agent shall check the report made with such books, papers documents or other records or evidence, and make his report to the Comptroller; and, if it appears from said report that any false or incorrect return has been made or that any individual, or the president, treasurer or superintendent of any company, corporation or association or any member of any firm required by this chapter to make reports, has failed or omitted to make a full return, as required by law, then the Comptroller shall notify such individual, or the president, treasurer or superintendent of any company, corporation or association, or receiver or receivers of any company, corporation or association, or any member of any firm, to make forthwith an additional or supplemental report; and, if any such individual or the president, treasurer or superintendent of any company, corporation or association, or any member of a firm, or any receiver or receivers of any company, corporation or association making said original report, shall fail or refuse to make said additional or supplemental report, he shall be guilty of a misdemeanor, and on conviction shall be punished as provided in the Penal Code; and venue of such prosecution is fixed in Travis County, Texas. If it appears from the report of the State Revenue Agent, or if the Comptroller has reason to believe or does believe, that any individual, or any president, treasurer or superintendent of any company, corporation, or association, or any receiver of any corporation or association, or any member of any firm, has wilfully and deliberately made a false report, the Comptroller shall report the matter to the grand jury

of Travis County, Texas, for its action; and venue of any offense arising out of such transaction is hereby fixed in Travis County, Texas. Said State Revenue Agent, in the performance and discharge of the duties imposed upon him in this article, shall have the right to examine, either by himself or by any person acting under his direction, any books, papers, documents, records or evidence which he may believe material and proper to examine."

Said statutes were passed in 1907, and if valid they have ever since been, and are now in full force and effect.

According to the allegations of plaintiffs' petition and as
32 shown by the evidence introduced at the hearing, the plaintiffs are wholesale dealers in mineral oils; that as such dealers they began business in Texas on or about January 1, 1910, with offices and warehouses at Dallas, and San Antonio, which business they have continued ever since, doing both intrastate and interstate business.

Plaintiffs have never owned any real estate in Texas, but have owned small quantities of personal property upon which they have paid all city and state and county ad valorem taxes from year to year. But plaintiffs allege that they have not made any of the reports nor paid any of the taxes required by said act. They charge that said act is unconstitutional and void in that the tax for which it provides would impose a burden upon interstate commerce in violation of Section 8, Article 1, of the Constitution of the United States, and in that the exaction of such a tax would deprive them of property without due process of law and deny to them the equal protection of the law in violation of the first section of the Fourteenth Amendment of the Constitution of the United States.

Plaintiffs further allege that according to the provisions of said State statute the Attorney General is required to bring suits in the name of the State of Texas for the recovery of the gross-receipts tax and penalties, and the Comptroller, if he believes that the plaintiffs have omitted to make full return of their gross receipts, is required to report the omission in writing to the Governor, whereupon the Governor is required to immediately cause an investigation to be made into the books, papers, and documents of the plaintiffs, or other records of evidence showing such omission, and when such omission has occurred the Comptroller is required to call upon the plaintiffs for a report for each quarter, and when plaintiffs shall fail,
33 as they will fail, to make the reports, said law denounces them guilty of a criminal offense of the grade of a misdemeanor for failure to make each such report, and subjects them to prosecution therefor in the criminal court. That the Comptroller, as he is required to do, has demanded of plaintiffs that they make quarterly reports from the time when they began business in Texas, that is to say, during the first quarter of the year 1910, and when the plaintiffs refuse to make such report, and they will refuse to make the same, the Comptroller will report such refusal to the Attorney General of the State of Texas, who will thereupon institute a suit or suits against the plaintiffs for the collection of penalties, and the

said Comptroller will prosecute the plaintiffs for such refusal to make a report for each quarter, and subject the plaintiffs to repeated prosecutions in the criminal court, and that plaintiffs will be subjected, as well to a civil suit or suits, for the collection of said taxes, and to restrain them from doing business in Texas until they shall pay said taxes. And plaintiffs allege that they have no adequate remedy at law, and that notwithstanding the invalidity of said State law, they will be subjected to said threatened wrongs and trespasses at the hands of the defendants unless protected by injunction.

In their answer defendants allege that the tax levied by said State statute is a tax only upon sales made and business done by plaintiffs within the State of Texas and not upon their interstate business, and that therefore said tax is not repugnant to any provision of the Constitution of the United States, and in the argument at the hearing counsel for defendants stated that the defendants had never sought, and did not intend to seek, to collect of plaintiffs any tax except upon their intrastate business and the plaintiffs' general manager testified that the accounts of plaintiffs' interstate business could be easily and accurately kept and reported separately from their interstate
34 business.

The petition for interlocutory injunction having been presented to W. R. Smith, Judge of the District Court for the Western District of Texas, he called to his assistance Walker, Circuit Judge, and Grubb, District Judge, in accordance with the provisions of Section 266, Judicial Code, and this hearing was before the special court thus constituted.

The matter immediately in hand is whether or not plaintiffs are entitled to a preliminary injunction which they have prayed for.

SMITH (*District Judge*), after making the foregoing statement of the case, delivered the opinion of the court.

Certain preliminary questions arising upon the face of the pleadings must first be disposed of. The defendants contend that this special court is without jurisdiction because, as they say, the constitutionality of the State statute as a matter of fact is not called in question; that plaintiffs' real contention is that unless restrained defendants will make an attempt to collect taxes and penalties from them and require reports of them which said law does not authorize. To determine this jurisdictional question we must look to the plaintiffs' petition. The case made by the allegations therein is that said act is unconstitutional in that it levies a tax upon the gross receipts of plaintiffs' interstate business which defendants will attempt to collect unless restrained, and they ask that defendants be enjoined from proceeding under said statute against them. This brings the case clearly within the provisions of Section 266 of the Judicial Code to determine which three judges are required. The constitutionality of the act must be determined by three judges whether the
35 judge to whom the petition is presented considers the claim of unconstitutionality meritorious or not. Ex parte Metropolitan Water Co., 220 U. S. 539.

Another question of jurisdiction is raised by the contention of defendants that the plaintiffs' petition shows this in effect to be a suit against the State, such is prohibited by the Eleventh Amendment of the Constitution of the United States. The question involved in this contention has frequently been before the Supreme Court, and in numberous cases decided against defendants. The basis of plaintiffs' suit being the alleged unconstitutionality of the State law, levying the tax, the suit is not against the State. Truax v. Raich, 239 U. S. 33; Ex parte Young, 209 U. S. 123; Ludwig v. Western Union Tel. Co., 216 U. S. 146; W. U. Tel. Co. v. Anderson, 216 U. S. 165; Herndon v. C. R. I. & P. Ry. Co, 218 U. S. 135; Philadelphia Co. v. Stimson, 223 U. S. 605; Hom. Tel. Co. v. Los Angeles, 227 U. S. 278; Smythe v. Ames, 169 U. S. 218.

The defendants raise the further question as one of jurisdiction that the plaintiffs have failed to bring their case within or under any of the recognized heads of equity jurisdiction, and that therefore this court is without jurisdiction to grant the relief prayed for. We regard this proposition without merit. Plaintiffs allege that the proposed tax is illegal because the statute purporting to authorize it is unconstitutional and void, and that unless restrained the defendants will subject plaintiffs to a multiplicity of civil suits and criminal prosecutions, to enforce the provisions of said statute, and will attempt to enjoin plaintiffs from doing business in Texas. In such cases injunction will lie. Dennis & Farnham Mfg. Co. v. Los Angeles, 189 U. S. 207; Dobbins v. Los Angeles, 195 U. S. 223; Ex parte Young, 209 U. S. 123; Philadelphia Co. v. Stimson, 223 U. S. 605; Truax v. Raich, 239 U. S. 33.

36 This brings us to the real decisive question in the case, and that is whether or not the State statute levying the tax is unconstitutional. The general limitations upon State control of commerce is well defined. It is well settled that a State cannot levy a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from the transportation, or on the occupation or business of carrying it on; for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs to Congress. (Pacific Express Co. v. Gilbert, 142 U. S. 339.) And in accordance with this general principle it is now settled that a State statute levying a tax upon the gross receipts derived from commerce between the States and with foreign countries is unconstitutional and void. (Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217.)

On the other hand, a State may levy a tax on the intrastate receipts of an interstate corporation, whether it be a domestic or foreign corporation. Lehigh Valley Ry. Co. v. Penn, 145 U. S. 192; Ohio Tax Cases, 232 U. S. 576; Pacific Express Co. v. Gilbert, 142 U. S. 339. And when the same person or corporation is engaging in both interstate and intrastate commerce the intrastate business may be taxed by the State. Osborne v. Florida, 164 U. S. 654.

A State tax on business done exclusively within the State and not including any interstate business, is not an interference with nor bur-

den upon interstate commerce. W. U. Tel. Co. v. Texas, 105 U. S. 460; Postal Tel. Cable Co. v. Charleston, 153 U. S. 692. And a State tax is not wholly invalid when assessed upon receipts derived partly from interstate commerce and partly from commerce within the State, but it is invalid only on the interstate portion of the receipts, and when the means are presented whereby the re-
37 ceipts derived from both classes of commerce can be separated, the tax may be levied on the domestic receipts. Rattemann v. W. U. Tel. Co., 127 U. S. 411; Allen v. Pullman Co., 191 U. S. 171; Wagner, et al. v. Covington, decided by the U. S. Supreme Court, Dec. 8, 1919.

Now, let us examine the statute in question, and see against whom and upon what object or objects it levies the tax. It is against those who "engage in this State in the business of wholesale dealers in coal oil," etc., and the tax is levied upon the gross amount collected and uncollected from any and all "sales made within this State." The words quoted are words of limitation, and were evidently intended by the legislature to restrict the tax to intra-state commerce. By use of the expression "sales made within the State," the legislature no doubt intended to confine the tax to sales begun and completed within the State,—to sales which could not be classed as interstate commerce; else why should these qualifying words have been used? They certainly mean something.

The courts in a long line of decisions have enunciated the general principle that the presumption is in favor of the constitutionality of a statute. It has been declared that in no doubtful case should the courts pronounce legislation to be contrary to the constitution. It is elementary that where the validity of a statute is called in question and there are two possible interpretations by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it. In the case of St. Louis & S. W. Ry. Co. v. Arkansas, 235 U. S. 350, our Supreme Court said:

"We ought not to indulge the presumption that the legislature intended to exceed the limits imposed upon state action by the federal constitution, or that the courts of the state will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this, that if a
38 statute will bear two constructions, one within and the other beyond the constitutional power, the courts should adopt that which is consistent with the constitution, because it is to be presumed that the legislature intended to act within the scope of its authority."

To the same effect are, Singer Sewing Machine Co. v. Brieknell, 233 U. S. 313; Ohio Tax Cases, 232 U. S. 591; Chesapeake & Ohio Ry. v. Kentucky, 179 U. S. 388; Pacific Express Co. v. Seibert, 142 U. S. 142. And we may add that especially should this be the rule where the constitutional limitations had already been clearly defined by the courts when the legislative act in question was passed, as in the present case.

Therefore, applying the foregoing rules of construction, we believe it was legislative intent to tax only the gross receipts from the intrastate business of wholesale dealers in oil, and the statute should be so construed, and held to be valid. And as it is not alleged by plaintiffs that the defendants are threatening to proceed to collect any tax upon the gross receipts from the interstate commerce of the plaintiffs, but on the contrary defendants deny that they now have or that they have ever had any intention to attempt the collection of such tax from plaintiffs, the prayer of the plaintiffs for interlocutory injunction should be denied.

If the statute in question could be properly construed as levying a tax on the receipts of interstate as well as of intrastate business, still we would deny the injunction, as the evidence at the hearing clearly established the fact that the receipts from the interstate business could easily be kept separate from the receipts of the intrastate business, and that the latter could be reported separately. In this state of case, the tax on intrastate business would be valid, even though the tax on the interstate business would be unconstitutional and void. Ratterman v. Western U. Tel. Co., 127 U. S. 411. But
39 as the State officers charged with the enforcement of the act do not construe the act as applying to interstate business, and as they deny that they have any intention of attempting to collect any tax on the receipts of the interstate business of plaintiffs, we can see no necessity to grant the temporary injunction as to the tax on their interstate business. We cannot give our assent to the proposition advanced by plaintiffs that administrative officers of a State may be restrained by temporary injunction from doing an act in pursuance of a legislative enactment which is unconstitutional and void and which they themselves recognize as invalid, and which they make no threat and express no intention to enforce.

To sustain their right to an injunction in this case plaintiffs rely mainly upon the decisions in Galveston, Harrisburg & S. A. Ry. v. Texas, 210 U. S. 217, and H. B. & T. Ry. Co. v. Texas, 108 Texas, 314. We do not think those decisions are at all inconsistent with the views we have expressed. Those were suits to recover taxes, under State statutes, on the gross receipts from both the intrastate and interstate business of the defendants. The tax on the interstate business was a burden thereon and beyond the power of the State to levy or collect, and as there was no showing or contention that the intrastate business was separable from the interstate business the recovery was properly denied in toto. In those cases the State officers asserted the right to tax interstate commerce; in this case they disclaim any such right.

Plaintiffs' prayer for preliminary injunction is denied.

(Endorsed as follows, to-wit:) No. 64/305. Equity. Sonneborn Bros. vs. C. M. Cureton, et al. Opinion. Rendered at New Orleans Febry. 28, 1920. Filed at Austin, Texas, April 22, 1920. D. H. Hart, Clerk, by A. B. Coffee, Deputy. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

40 In the United States District Court for the Western District of Texas, Austin Division, November Term, 1920.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON et al.

Amended Original Bill.

To the Honorable Judges of said Court:

1.

Ferdinand Sonneborn, a citizen of the State of Maryland, domiciled and residing in the City of Baltimore; Sigmund B. Sonneborn, a citizen of the State of Maryland, domiciled and residing in the City of Baltimore; Max Pick, a citizen of the State of New York, domiciled and residing in the City of New York, and Julius Roten, a citizen of the State of New York, domiciled and residing in the City of New York, as partners doing business under the firm name and style of Sonneborn Brothers, bring this their bill in equity against C. M. Cureton, as Attorney General of the State of Texas, a citizen of the State of Texas, and an inhabitant of the western district of Texas, who resides in the City of Austin, and against Mark L. Wigginton, as Comptroller of the State of Texas, a citizen of the State of Texas, and an inhabitant of the western district of Texas, who resides in the City of Austin.

2.

The amount and matter in dispute herein, exclusive of interest and costs, exceeds in value the sum of three thousand dollars.

3.

The plaintiffs claim herein that the certain Act of the State of Texas, known as Article 7377 of the Revised Civil Statutes of the State of Texas, which is also Section Nine of Chapter Eighteen of the General Laws of the State of Texas, approved May 16th, 1907, Acts of 1907, page 479, in so far as said statute exacts from the plaintiffs as wholesale dealers in mineral oils refined from petroleum, a quarterly tax of two per cent of their gross receipts from the sale
41 by plaintiffs in Texas of oils and other petroleum products which have been imported by the plaintiffs into the State of Texas from other states and which have been sold by the plaintiffs in the unbroken original package used in the transportation thereof

into the State of Texas, is in violation of Section 8 of Article 1, of the Constitution of the United States, in that such tax is a burden on the commerce of plaintiff between the several states and that said law violates the First Section of the Fourteenth Article of the Constitution of the United States, known as the Fourteenth Amendment thereto, in that the exaction of such tax from the plaintiffs will deprive them of property without due process of law, and deny to them the equal protection of the law. The said Act is in words and figures substantially as follows:

"Art. 7377. Wholesale Dealers in Oils; 'Wholesale Dealers' Defined.—Each and every company, individual, corporation, or association created by the laws of this State, or any other State or nation, which shall engage in his own name, or in the name of others or in the name of its representatives or agents in this State in the business of wholesale dealers in coil oil, nap-tha, benzine or any other mineral oils refined from petroleum, shall make quarterly, on the first day of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this State of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations at the time of making said report, shall pay to the treasurer of the State of Texas an occupation tax for the quarter beginning on said date equal to two per cent of said gross receipts and amount uncollected from said sales as shown by said report. A wholesale dealer, within the meaning of this article, is any individual, company, firm, partnership, corporation or association who buys any of the articles herein before mentioned, either in his own name or in the name of others, or in the name of their representative or agent, and sells either in his own name, or in the name of others, or in the name of their representatives or agents to any person, firm, corporation or association to be sold again."

4.

The plaintiffs represent that under their firm name and style of Sonneborn Brothers, on or about the first day of January, 1910, they established a business in the City of Dallas, Texas, for the purpose of selling throughout the States of Texas, Oklahoma, Arkansas and New Mexico certain mineral oils refined from petroleum.
42 These oils are known chiefly as Amalie 1-2-3, Non Carbon Cylinder Oil and Amalie Pennsylvania Oils; and in connection with the sale of these oils, the plaintiffs also sold greases, white oils and petroleum. In connection with the sale of the goods aforesaid, the plaintiffs also sold Lapidolith Floor Hardener, Cemcoat Enamel-Like Coating Hydrocide Damp Proofer, paints for all purposes, and the article Sonnotint of the same nature. And plaintiffs under their said firm name and style, have continued to conduct the said business in the State of Texas, at their establishment opened

as aforesaid at Dallas and have used for a time in connection therewith a public warehouse in the City of San Antonio, Texas.

5.

Prior to the institution of this suit, the plaintiffs since they commenced doing business in Texas, as before stated, and up to the 11th day of April, 1919, have made total sales within the State of Texas of goods, wares and merchandise, consisting chiefly of mineral oils refined from petroleum, from which they have received as gross receipts $860,801.50, and two per cent of these gross receipts is $17,216.03. All the goods so sold by the plaintiffs were collected for and the gross receipts aforesaid accruing prior to April 11th, 1919, were received quarterly as follows:

1910.

January to March, inclusive	$1,293.03
April to June, inclusive	5,047.22
July to September, inclusive	7,492.67
October to December, inclusive	6,778.53

1911.

January to March, inclusive	$6,577.37
April to June, inclusive	8,000.26
July to September, inclusive	9,921.86
October to December, inclusive	11,014.62

1912.

January to March, inclusive	$12,364.06
April to June, inclusive	13,228.04
July to September, inclusive	15,935.20
October to December, inclusive	14,877.61

43

1913.

January to March, inclusive	$21,355.45
April to June, inclusive	19,300.75
July to September, inclusive	24,709.99
October to December, inclusive	17,133.52

1914.

January to March, inclusive	$15,414.89
April to June, inclusive	19,832.25
July to September, inclusive	19,702.93
October to December, inclusive	16,074.38

1915.

January to March, inclusive	$16,856.23
April to June, inclusive	21,673.56
July to September, inclusive	25,608.84
October to December, inclusive	31,229.80

1916.

January to March, inclusive	$31,506.58
April to June, inclusive	22,881.91
July to September, inclusive	37,106.88
October to December, inclusive	33,952.10

1917.

January to March, inclusive	$39,946.85
April to June, inclusive	39,453.03
July to September, inclusive	57,404.83
October to December, inclusive	35,019.29

1918.

January to March, inclusive	$39,390.83
April to June, inclusive	53,794.18
July to September, inclusive	57,386.69
October to December, inclusive	28,691.93

1919.

January to March, inclusive	$29,182.28
April 1st to 11th, inclusive	8,661.06

6.

During the time that plaintiffs have been engaged in the conduct of their business, as aforesaid, and up to the 30th day of June, 1920, they have sold and delivered within the State of Texas, goods, wares and merchandise, consisting chiefly of mineral oils refined from petroleum, in the original unbroken packages containing the several articles when imported into the State, from which they have received as gross receipts the sum of $233,728.94, and all goods so sold have been collected for. These goods were brought by plaintiff into the State of Texas before they had sold them or received orders
44 for them. Two per cent on the amount of said gross receipts aggregates $4,674.58. During the same period plaintiffs have sold in the State of Texas like goods, imported in the same manner into the State of Texas, but sold in or out of packages which had been broken after their arrival in Texas, from which plaintiffs have derived gross receipts of $16,549.84, all of the goods so sold

having been collected for, and two per cent of the last named sum is $330.99.

7.

Before and when this suit was instituted the then Comptroller of the State of Texas, Henry B. Terrell, an original defendant herein, and the immediate predecessor of the defendant, Mark L. Wigginton, was claiming and demanding from the plaintiffs the full sum of $17,216.03, but in their answers to the original bill herein and on the hearing of the application for a temporary injunction the defendants disclaimed an intention to insist on the payment of the gross receipts tax of two per cent on such gross receipts as were derived from sales of merchandise made in Texas before the merchandise was brought into the State, or of merchandise located in Texas, but sold on orders requiring shipment thereof into another State, but they contended then and the defendants now contend for and demand that the plaintiffs shall pay the two per cent gross receipts tax on all goods sold in Texas which were located in Texas at the time of sale and which were delivered in Texas, although said goods had been imported by the plaintiffs and sold by plaintiffs in the original unbroken package containing them when imported into Texas. On the 3rd day of September, 1920, the plaintiffs tendered to the defendant, Mark L. Wigginton, Comptroller of the State of Texas, a report of their gross receipts in Texas up to June 30th, 1920, from sales in unbroken packages, as well as from sales in broken packages, and which reports are as follows:

Gross Receipts Tax Statement by Wholesale Dealers in Coal Oils, Nap-tha, Benzine, and Other Oils.

Dallas, Texas,
September 2, 1920.

To the Comptroller of Public Accounts:

In compliance with Article 7377, Chapter 2, Title 126,
45 Revised Civil Statutes of 1911, I have to report that the gross receipts of Sonneborn Bros. in Texas for the quarters beginning January 1, 1910, and ending June 30, 1920, were:

Total amount collected from sale of coal oil, benzine, and other oils refined from petroleum shipped by them from other States into Texas and warehoused in Texas before being sold, excluding all sales of merchandise not warehoused before being sold which was sold in unbroken packages	$233,728.94
The amount uncollected from the sale of said articles	000,000.00
Two per cent on said amount	4,674.58

SONNEBORN BROS.,
By H. J. COHN,
Manager.

STATE OF TEXAS,
County of Dallas:

H. J. Cohn, being duly sworn, states that he is Manager of Sonneborn Bros., of the city of New York, at Dallas, Texas, and that since they commenced business in Texas, he has continuously been the Manager of their Texas business; that the foregoing statement shows the gross amount collected and uncollected from any and all sales made within this State by said Sonneborn Bros. of any and all coal oil, nap-tha, benzine, or other mineral oils refined from petroleum (not including goods brought into Texas from other States and not warehoused) during the quarters commencing January 1, 1910, and ending June 30, 1920; and that Sonneborn Bros. have not sold in Texas any goods manufactured in Texas or purchased by them in Texas; and that said statement is true and correct; and affiant is authorized by his principals to make the same.

H. J. COHN.

Subscribed and sworn to before me on this, the 2nd day of September, A. D. 1920, by said H. J. Cohn.

[SEAL.] MYRTLE CROUCH,
Notary Public, Dallas County, Texas."

"*Gross Receipts Tax Statement by Wholesale Dealers in Coal Oils, Nap-tha, Benazine, and Other Oils.*

Dallas, Texas,
September 2, 1920.

To the Comptroller of Public Accounts:

In compliance with Article 7377, Chapter 2, Title 126, Revised Civil Statutes of 1911, I have to report that the gross receipts of Sonneborn Bros. in Texas for the quarters beginning January 1, 1910, and ending June 30, 1920, were:

46 Total amount collected from sale of coal oil, nap-tha, benzine, and other oils refined from petroleum sold in broken packages which had been shipped into Texas from other States before being broken, excluding goods not warehoused and goods sold in unbroken packages.....	$16,549.84
The amount uncollected from said articles.....	00,000.00
Total.....	16,549.84
Two per cent on said amount, (the tax for the quarters beginning and ending on said dates).....	330.99

SONNEBORN BROS.,
By H. J. COHN,
Manager.

STATE OF TEXAS,
County of Dallas:

H. J. Cohn, being duly sworn, states that he is Manager of Sonneborn Bros., of the City of New York, at Dallas, Texas, and that since they commenced business in Texas, he has continuously been the Manager of their Texas business; that the foregoing statement shows the gross amount collected and uncollected from any and all sales made within this State by said Sonneborn Bros. of any and all coal oil, nap-tha, benzine, or any other mineral oils refined from petroleum in broken packages (not including goods brought into Texas from other states but not warehoused nor those sold in unbroken packages) during the quarters commencing January 1, 1910, and ending June 30, 1920; and that Sonneborn Bros. have not sold in Texas any goods manufactured in Texas or purchased by them in Texas; and that said statement is true and correct; and affiant is authorized by his principals to make the same.

H. J. COHN.

Subscribed and sworn to before me on this the 2nd day of September, A. D. 1920, by said H. J. Cohn.

[SEAL.] MYRTLE CROUCH,
Notary Public, Dallas County, Texas."

The Comptroller refused to receive the reports except upon the condition that plaintiffs pay into the State Treasurer $4,674.58 as the gross receipts tax for the period covered by the reports. The plaintiffs on September 3, 1920, tendered to the defendant, Mark L. Wigginton, Comptroller, the sum of $330.99, which is two per cent on their gross receipts from sales of and from broken packages up to June 30th, 1920, but the said defendant refused to receive the same on the grounds that he had no authority to receive a partial payment and that the amount really due exceeded the sum tendered by $4,343.59.

47 8.

The plaintiffs have constantly conducted their business in the State of Texas through a manager and salesmen travelling from the Dallas office for the purpose of taking orders and through one salesman travelling from San Antonio, for the same purpose. These salesmen solicited in Texas, Louisiana, Arkansas, Oklahoma, New Mexico and less frequently in other states, orders for plaintiffs' wares. The orders when taken were sent to the office at Dallas for acceptance, and when accepted were usually approved by the manager at Dallas, but at times when the order was for a large quantity the question of credit was referred to and passed upon by plaintiffs' credit department at their office in the City of New York maintained for that and other purposes. Orders were also received at the Dallas office direct from customers in Louisiana, Oklahoma, Texas and New Mexico. When these orders were accepted they were sometimes filled by shipments from Dallas, sometimes by shipments from San

Antonio, and sometimes by shipments directly from the factories or refineries of I. Sonneborn Sons, Incorporated, situated at Nutley in the State of New Jersey, and at Petrolia, in the State of Pennsylvania, from whom the plaintiffs purchased all of the nap-tha, benzine, coal oils and other mineral oils and petroleum products which they have sold and delivered in Texas. The plaintiffs have neither manufactured in Texas, nor bought in Texas, any benzine, nap-tha, coal oils and other mineral oils or products refined from pertoleum, or any other goods, wares or merchandise sold by them. They have only sold at Dallas or on orders received there and at San Antonio, or on orders received there, and at any other place in Texas on orders or otherwise, goods, wares and merchandise which had been purchased by them in other states than Texas, and which after being so purchased had been shipped to the customer directly from the place where purchased by the plaintiffs, after the purchase, or which had been shipped from the place of purchase to the plaintiffs at Dallas or at San Antonio, and there held by the plaintiffs in the unbroken original package of importation until sold by them except as
48 hereinafter shown in this paragraph. The oils which were the chief items from which plaintiffs have derived gross receipts, were always shipped either in sealed drums, wood barrels or cases containing one gallon and five gallon tin cans of oil, which drums, wood barrels and cases constituted the original package. The plaintiffs have had no storage tanks in Texas, have received no oil in Texas in tank cars, nor have they, in Texas, filled any drums, barrels or cans with oil, but they have sold only in the original container, sealed at the factory, and sales by them to their customers were with the assurance that the merchandise was in the exact condition as when it left the factory, and that the sealed container was sealed at the factory and not elsewhere, which assurance was true in every instance.

The paintiffs have very infrequently, for the accom-odation of a customer who habitually bought a larger quantity, and as an incident to their business as wholesale dealers in unbroken packages of imported oils, varied their method of doing business to the extent of pouring oil out of a drum into a ten gallon milk can, which in turn would be emptied into the tank of the customer, and they have likewise sometimes broken a case to sell one can of oil as an accom-odation to a customer usually buying in larger quantity, but this practice has not occurred frequently, and the sales so made have been purely incidental and have constituted approximately one and ninety two hundredths per cent of the plaintiffs' total business in Texas, and the gross revenue arising therefrom has constituted approximately one and ninety-two hundredths per cent of the total gross receipts from all of the plaintiffs' business, and the gross receipts from sales so made in broken packages have amounted to approximately seven and eight one hundredths per cent of plaintiffs' gross receipts from all sales in broken and unbroken packages, where the goods were brought into Texas before they were sold and were then sold and delivered in the State of Texas. That these sales in broken

packages were not sold at wholesale but were all retail sales of small quantities made without a view to profit and the gross receipts derived by plaintiffs from said sales in broken packages included no profit.

49

9.

Whenever a sale has been made by the plaintiffs on an order received at Dallas or at San Antonio, a record of the sale has been made in ledgers kept by the plaintiffs at Dallas or at San Antonio, in order to enable plaintiffs promptly to render statements to customers. Copies of all invoices made at Dallas or San Antonio to plaintiffs' customers have been sent daily to the plaintiffs' New York office, where the books of account of the plaintiffs have been kept and all trial balances made. The purpose of keeping these records at Dallas (and formerly at San Antonio) was merely to enable the plaintiffs promptly to give information to customers, and thereby avoid the delay incident to securing the information from the New York office. All information pertaining to salesmen's commissions, to profits and all other data from the books than the condition of customers' accounts has been obtainable only at the New York office. All funds received by plaintiffs at their Dallas office were deposited in a bank at Dallas to plaintiffs' credit, subject to checks thereon drawn only at their New York office, and all funds received by the plaintiffs at San Antonio, were deposited in a bank there to the plaintiffs' credit, likewise subject to checks drawn only at their New York office, and no agent of plaintiffs living in Texas has had authority to check against either account, and no other bank in Texas has received deposits of receipts from the plaintiffs' Texas business, or any other funds of plaintiffs.

10.

The plaintiffs have rented one floor in a four story building at Dallas, used as an office and storeroom, and they have used for the storage at San Antonio space in a public warehouse. They never have owned, and do not now own real estate in the State of Texas, nor any property located there save money and the credits which from time to time arose in said banks in course of transmission of funds to the plaintiffs in New York; such merchandise as they have imported into the state and held in their storage room at Dallas and in said public storage house at San Antonio, for sale in orig-
50 inal unbroken packages, (except as hereinbefore stated); one Ford car and certain office furniture and fixtures of small value.

On their said property situated in Texas, including merchandise in storage on January 1st of each year, on which day the assessment and levy is effective, the plaintiffs have paid ad valorem taxes for the years and in amounts, as follows:

City Taxes.

1911	$52.78	
1912	69.12	
1913	52.80	
1914	35.15	
1915	75.05	
1916	69.35	
1917	76.55	
1918	166.73	
1919	198.78	and

State and County Taxes.

1912	31.09
1913	28.00
1914	29.00
1915	52.80
1916	34.96
1917	51.47
1918	53.04
1919	116.32

11.

The laws of the State of Texas now provide, and since the year 1907 have provided, that every individual, company, corporation, firm or association which is required to pay a gross receipts tax, shall for every quarter of the year succeeding the quarter during which business was commenced make a report to the Comptroller of the State of Texas of the business of the preceding quarter; and every wholesale dealer in oils is required by said law to make quarterly, on the First day of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual, or of the president, treasurer or superintendent of such company, corporation or association as may be engaged in such business, showing the gross amount collected or uncollected from any and all sales made within the state of Texas of mineral oils and petroleum products during the quarter next preceding. And the
51 said law also provides that such individual, company and association at the time of making said report shall pay to the treasurer of the State of Texas a tax called an occupation tax for the quarter beginning on said date, equal to two per cent of said gross receipts, and amount uncollected from said sales, as shown by said report. And said law further provides that any person, company, corporation or association, or any receiver or receivers failing to make a report after thirty days from the date when said report is required by this chapter to be made, shall forfeit and pay to the State of Texas a penalty of not to exceed one thousand dollars, and said law further provides, that any person, company, corporation or association or any receiver or receivers, failing to pay any tax after thirty days

from the date when said tax is required by law to be paid, shall forfeit and pay to the State of Texas a penalty of ten per cent upon the amount of such tax.

12.

And said law further provides that no individual failing to pay such tax shall do business in the State of Texas until such tax is paid.

13.

The plaintiffs have not made the reports required by said gross receipts tax act, nor any reports of gross receipts except those hereinbefore set forth which the defendant Wigginton refused to receive, neither have they paid the tax purported to be levied by said gross receipts tax law, and forty one quarterly returns, required by said Act, as construed by the defendant, have not been made by the plaintiffs. For the failure to make these returns or reports the purported Act provides penalties aggregating not to exceed forty one thousand dollars; and forty one payments of the gross receipts tax, as provided by said purported law, have not been made by the plaintiffs, for the failure to make which payments the said purported Act provides penalties to the amount of ten per cent of the tax due, and the said gross receipts tax, itself, for the period covered by said quarters, as now contended for by defendant, aggregates four thousand six hundred and seventy four dollars and fifty eight cents, of
52 which amount the *the* plaintiffs admit they are liable to pay three hundred and thirty dollars and ninety-nine cents, which is two per cent of their gross receipts from their sales of and from broken packages, payment of which they have tendered to the said defendant Comptroller, which he has refused to accept, and which they still are liable and willing to pay and now again tender to the defendants for payment into the State Treasury.

14.

The laws of the State of Texas make no provision for suing the State nor any officer of the State for recovery of a tax paid under protest.

15.

Under the said pretended law of the State of Texas, the Attorney General is required to bring suits in the name of the State of Texas for the recovery of the gross receipts tax, and the penalties aforesaid, and by said law the Comptroller of Public Accounts, if he believes that the plaintiffs have omitted to make a full return of their gross receipts, is required to report the omission in writing to the Governor. Whereupon, under said law, the Governor is required to immediately cause an investigation to be made into the

books, papers and documents of the plaintiffs, or other records or evidence showing such omission, and when such omission has occurred the Comptroller is required to call upon the plaintiffs for a report for each quarter, and when the plaintiffs shall fail, as they will fail, to make the reports required by said Act as construed by the defendants the law denounces them as guilty of a criminal offense of the grade of a misdemeanor for failure to make each such report, and subjects them to criminal prosecution therefor in the District Court of Travis County. Under said law the said Comptroller, as he is required to do, has demanded of the plaintiffs that they make a report for each quarter from the time when they began business in Texas, that is to say during the first quarter of the year 1910, and when the plaintiffs refuse to make such a report, and they will refuse and omit to make the same the Comptroller of Public Accounts will report such refusal and omission to the Attorney General of the State of Texas, who will thereupon institute a
53 suit or suits against the plaintiffs, for the collection of said penalties, and the said Comptroller will prosecute the plaintiffs for such refusal and omission to make a report for each quarter, and subject the plaintiffs to repeated prosecution in the District Court of Travis County. And plaintiffs will be subject, as well, to a civil suit, or suits, for the collection of said illegal exactions of purported gross receipts taxes, and to restrain them from doing business in Texas until they shall pay said illegal demands for two per centum upon their quarterly gross receipts as wholesale dealers in mineral oils and petroleum products on sales of their property in interstate commerce, when the sales were made in Texas of goods imported by plaintiffs into said State and held in the unbroken original package of importation for sale and sold there in such unbroken original package.

16.

The plaintiffs have not kept a separate account of their gross receipts from goods sold in Texas of and from broken packages, and such receipts have been entered on the plaintiffs' books as part of their general gross receipts, and the expense attending a separation of the broken package gross receipts from the other gross receipts would amount to much more than the sum of the tax that under the Act would be due thereon, which has averaged only about $33.09 yearly. Since the hearing of the application for a temporary injunction and in order to present the question as to the constitutionality of the tax on the gross receipts from plaintiffs' sales in Texas of unbroken original packages of its goods sold in the State after arrival in the State, the plaintiffs at an expense of more than $1,000 by an examination of the original orders, an analysis of book entries and from other data contained in their books and records, but not in separated form, ascertained and tabulated their gross receipts from their Texas business into the three classes, hereinbefore set forth.

Total gross receipts of plaintiffs from sales made in Texas up to and including April 11th, 1919	$860,801.50
Two per cent of, which, is	17,216.03

(This is the amount which the then Comptroller was demanding that the plaintiffs should pay when this suit was instituted.)

54 Gross receipts of plaintiffs from sales made in Texas of their merchandise imported into Texas before it was sold, which was stored by them in Texas in the unbroken original packages in which it was shipped into Texas, and which was afterwards sold and delivered in Texas in the original package without breaking the package, on and prior to June 30th, 1920	$217,179.10
2% of which is	4,343.58
Gross receipts from plaintiffs' goods sold in Texas on and before June 30th, 1920, in or from broken package	16,549.84
2% of which is	330.99

The statistics at hand when the original bill was prepared reached down only to April 11th, 1919 and those now available come down to June 30th, 1920, but do not include the gross receipts between April 11th, 1919, and June 30th, 1920, from that portion of the plaintiffs' sales now conceded by the defendants to constitute interstate commerce. It would not have availed plaintiffs had they kept a separate account of their gross receipts from broken packages and made returns thereon quarterly, because such reports and the taxes shown to be due thereby would not have been received from plaintiffs, and the tender thereof only would not have protected plaintiffs from the pains and penalties of said Act, without the interposition of this Honorable Court.

17.

Plaintiffs at one time attempted to comply with said Act as they supposed the same to operate on their Texas business and sent a check to the State Revenue Agent for $381.56; and prior to the institution of this suit and on December 30th, 1918, the plaintiffs received from the State Revenue Agent, whose duties have since devolved upon the Comptroller, a letter in terms substantially as follows, to wit:

"December 30th, 1918.

Messrs. Sonneborn Brothers,
282 Pearl Street,
New York, N. Y.

GENTLEMEN:

This Department is in receipt of your remittance of $381.56 in payment of gross receipts tax on your wholesale oil business.

I am holding your check and have to advise that these payments must be made on sworn statements of the amount of business done, and I have further to advise that this tax is due from the beginning of the business, if business was begun after the 1st of July, 1907, up to the present time, together with 10 per cent penalty.

55 The law fixes the quarters to begin January 1st, April 1st, July 1st, and October 1st, of each year. You are also due a beginning quarter tax of $50.00, plus the 10 per cent penalty.

I am enclosing herewith blanks and ask that you take up this matter at once and greatly oblige.

Yours very truly,

E. B. HOUSE,
State Revenue Agent."

Thereafter, on the 23rd day of May, 1919, the plaintiffs received from the then Comptroller, H. B. Terrell, a letter in words and figures substantially as follows:

"May 23, 1919.

"The Sonneborn Brothers Oil Co.,
Wholesale Oil Dealers,
Dallas, Texas.

GENTLEMEN:

This is final notice of your delinquency in payment of your Gross Receipts Taxes for the quarter ending March 31, 1919.

Unless this Department receives statement and taxes covering same within the next five days, penalties as provided by law will be enforced.

Very truly yours,

H. B. TERRELL,
Comptroller."

Attached to the letter last mentioned was a printed form, partially filled in in writing, the written part is here underscored as italics, which follows:

Important.—To avoid penalty and a possibility of forfeiting your permit to do business in Texas, have this statement and taxes covering same reach this Department not later than thirty days after the expiration of this quarter.

Gross Receipts Tax Statement by Wholesale Dealers in Coal Oil, Nap-tha, Benzine, and Other Oils.

To the Comptroller of Public Accounts of the State of Texas:

In compliance with Article 7377, Chapter 2, Title 126, Revised Civil Statutes of 1911, I have to report that the gross receipts of *Sonneborn Bros. Wholesale Oil Dealers Dallas, Texas* in Texas for the quarter ending *March 31, 1919,* were:

56. The amount collected from sale of coal oil, naptha, benzine and other oils refined from petroleum .....$.....
The amount uncollected from the sale of said articles...$.....
Total.....$.....
Two per cent on said amount, (Tax for quarter beginning on said date).....$.....
—— ——.
—— ——.

THE STATE OF TEXAS,
County of ——:

—— ——, being duly sworn, states that he is — of the — at —, Texas; that the foregoing statement shows the gross amount collected and uncollected from any and all coal oil, nap-tha, benzine or any other mineral oils refined from petroleum during the quarter ending *March 31, 1919,* and that said statement is true and correct.

—— ——,
—— ——.

Sworn to and subscribed before me, this — day of —— A. D. 191-.
[SEAL.] —— ——,
—— ——.

Send no money to this office, remit direct to State treasurer."

57 After plaintiffs received the letter of May 23, 1919, their attorneys wrote to Honorable E. B. House, State Revenue Agent, in respect to the matter, on behalf of the plaintiffs, as follows:

"April 1, 1919.

Hon. E. B. House,
State Revenue Agent,
Austin, Texas.

DEAR SIR:

As attorneys for Sonneborn Brothers notices with respect to gross receipt- tax from your department have reached us. We are investigating the application of this law to these gentlemen and beg to advise that it appears that a large part, probably a majority, of their business is purely interstate.

It has occurred to us that we may with propriety inquire of the view of your department as to the applicability of the tax in question to that portion of their business. If you can properly do so, we will appreciate a response at your early convenience.

Very truly yours,

ETHERIDGE, McCORMICK & BROMBERG,
By H. L. BROMBERG."

H. L. B. mc.

To this letter the plaintiffs' said attorneys received the following reply, dated April 4th, 1919:

"April 4, 1919.

Etheridge, McCormick & Bromberg,
1206-1220 Western Indemnity Bldg.,
1002 Main Street,
Dallas, Texas.

GENTLEMEN:

Replying to your letter of the first inst., with reference to the payment of gross receipt taxes of Sonneborn Brothers as wholesale oil dealers, beg to advise that under Article 7377, wholesale dealers in oil are required to pay a 2% tax at the end of each quarter upon any and all sales made within this State. This does not contend for any tax other than upon sales made within the State.

Very truly yours,

H. B. TERRELL,
Comptroller."

J. B. D./b.

18.

The plaintiffs have no adequate remedy at law for the threatened trespasses and wrongs about to be perpetrated upon them under the guise of said gross receipts tax law, and which they will suffer at the hands of the defendants herein unless protected by the gracious writ of injunction issued out of this Honorable Court.

58

19.

Plaintiffs are able and willing to pay and now again tender to the defendants and to the Treasurer of the State of Texas, the sum of $330.99, being two per cent on the gross receipts accruing to the plaintiffs prior to January 30th, 1920, from the sale of coal oil, nap-tha, benzine and other oils refined from petroleum and sold in and from broken packages which had been shipped into Texas from other states, as shown by the report tendered to Mark L. Wigginton, Comptroller, as hereinbefore set forth of sales made by the plaintiffs in Texas from broken packages.

20.

Wherefore, premises considered, the plaintiffs pray that this suit which has abated as against Henry B. Terrell, because he has ceased to be Comptroller, be revived against his successor Mark L. Wigginton, present Comptroller, and that a subpœna issue in terms of law herein to the defendant, Mark L. Wigginton, Comptroller, commanding him to appear and answer herein, but not under oath, and answer under oath being expressly waived, and that on a final hearing this Honorable Court award to the plaintiffs a decree perpetually

enjoining and restraining the defendant, C. M. Cureton, Attorney General, from instituting any suit or suits to collect the said purported gross receipts tax on the gross receipts of plaintiffs arising from the sale by them in Texas of any goods, wares or merchandise imported by them into the State of Texas and there held by them for sale in, and there sold and deliverel by them in, the unbroken original package in which such articles respectively were imported by plaintiffs into the State of Texas; and from instituting any suit or suits to recover penalties from the plaintiffs for failure to make quarterly reports of their gross receipts, as required by the Comptroller; and from bringing any suit or suits to restrain plaintiffs from doing business in Texas on account of their failure to pay the gross receipts tax on the gross receipts from the sale of merchandise imported by them into the State of Texas and there held by them for sale and sold and delivered there in the unbroken original package in which it was imported; and enjoining and restraining the defendant, Mark L. Wigginton, as Comptroller of Public Accounts, from calling
59 on plaintiffs to make any report or reports of their gross receipts as wholesale dealers in mineral oils and petroleum products, arising from the sale of merchandise imported by plaintiffs into the State of Texas and held there for sale in the original unbroken packages and sold and delivered in such packages in the State of Texas, and from prosecuting plaintiffs for failure to make such report or reports, or for making any alleged false report in respect thereto, or for doing, refusing to do, or omitting to do any act in respect of such gross receipts from their sales of merchandise sold in Texas in the original unbroken package of importation required of the plaintiffs by said purported gross tax receipt law. And plaintiffs pray for costs and for such other relief as they may be entitled to according to the principles of equity and as in duty bound the plaintiffs will ever pray.

SONNEBORN BROTHERS,
(Signed) By ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

(Signed) J. M. McCORMICK,
Of Counsel.

60 In the United States District Court for the Western District of Texas, Austin Division.

In Equity.

No. 64/305.

SONNEBORN BROTHERS

vs.

C. M. CURETON et al.

Now come the plaintiffs by their solicitors and pray leave of the Court to file herein their Amended Original Bill attached hereto.

(Signed) ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

We hereby consent that leave be granted the plaintiffs to file their Amended Original Bill attached.

(Signed) C. M. CURETON,
Attorney General of Texas;
(Signed) C. W. TAYLOR &
E. F. SMITH,
Asst. Attorney- General of Texas,
Solicitors for Defendants.

Leave is hereby granted the plaintiffs to file the attached Amended Original Bill.
Dated this 4th day of October, A. D. 1920.

(Signed) DU VAL WEST,
U. S. District Judge.

(Endorsed as follows, to wit:) No. 64/305. In Equity. Sonneborn Brothers vs. C. M. Cureton, et al. Plaintiffs' Amended Original Bill and Order Granting Leave to File Same. Filed October 6, 1920. D. H. Hart, Clerk, by A. B. Coffee, Deputy. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

61 In the United States District Court for the Western District
Texas, Austin Division, November Term, 1920.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON et al.

Amended Original Answer.

To the honorable judges of said court:

The answer of the above named C. M. Cureton, Attorney Gene
of Texas, and Mark L. Wiginton, Comptroller of the State of Tex
defendants, to the bill of complaint exhibited against them by
above named complainants.

These defendants now and at all times hereafter, saving and
serving to themselves all and all manner of benefits and advanta
of exception which may be had or taken to the many errors, unc
tainties, imperfections and insufficiencies in the complainants' s
bill of complaint contained for answer hereunto or unto so much
such parts thereof as these defendants are advised that it is mate
or necessary for them to make answer unto, answer same.

I.

Defendants admit the allegations contained in the first paragra
of plaintiffs' amended original bill as to the names of the par
plaintiff and their residence, also as to the names and official ch
acter and residence of the parties named as defendant.

62 II.

Defendants admit that the amount and matter in dispute her
exclusive of interests, costs and penalties, exceed in value the sum
Three Thousand ($3,000.00) Dollars.

III.

These defendants deny that Article 7377, Revised Civil Statute
the State of Texas, which was Section 9, Chapter 18, General L
of the State of Texas, approved May 16, 1907, Acts of 1907, p
479, in so far as said statute exacts from the plaintiffs as whole
dealers in mineral oils refined from petroleum a quarterly tax of
per cent of their gross receipts on sales made within the State
Texas, is in violation of Section 8 of Article One of the Constitut
of the United States.

These defendants allege that the tax exacted by said Article 7377 is a tax on all sales made within this State by each and every company, individual, corporation or association created by the laws of this State or any other State or nation which shall engage in his own name or in any name of its representatives or agents in this State in the busness of wholesale dealers in coal oil, nap-tha, benzine or any other mineral oils refined from pertoleum; and they deny that such taxes are a burden upon the commerce of the plaintiffs between the several States.

These defendants deny that said Article 7377 is in violation of the first section of the Fourteenth Article of the Constitution of the United States, known as the Fourteenth Amendment thereto, and deny that the *execution* of the tax provided for in said article from the plaintiffs will deprive them of property without due process of law, or deny them equal protection of the law.

63

IV.

These defendants will accept as true statements made by plaintiffs in the fourth paragraph of their bill of complaint.

V.

These defendants state that they do not know whether the statement of plaintiffs made in the fifth paragraph of their bill of complaint as to the value of the goods, wares and merchandise, consisting chiefly of mineral oils from refined petroleum sold within the State of Texas, is accurate and correct, and of this, they demand that strict proof be made.

VI.

Defendants state that they are not advised sufficiently to admit the truth as to the volume of sales made in Texas in the original unbroken packages as set out in the sixth paragraph of plaintiffs' bill, and of this, they demand strict proof.

These defendants further state that they are not sufficiently advised to admit the correctness of the statement made in the sixth paragraph of the amended bill as to the volume of sales made by plaintiffs in broken packages, and of this they demand strict proof.

VII.

Defendants admit the truth of the statements contained in the seventh paragraph of the plaintiffs' amended bill with reference to the claims made by these defendants, and with reference to the reports made by plaintiffs and the tender for $330.99 made to the Comptroller in payment of the gross receipts tax due, but these defendants are not sufficiently advised as to the facts as to permit them to admit the correctness of said reports with reference to the volume of sales made, and in this connection, the defendants would

64 show the court that under the laws of Texas, the plaintiffs having failed to make the report and payment of the gross

receipts tax in the way and manner, and at the time, required by law, have made themselves liable to the State of Texas in a large sum by way of penalties for having failed to comply with the law in making such reports and payment of the gross receipts tax, as provided by law.

Defendants have not waived the payment of these penalties, and under the law, cannot do so, but must and will continue to insist that the same be paid as required by law.

VIII.

These defendants state that they do not know whether the sixth paragraph of plaintiffs' bill of complaint, alleging the method by which sales are made and in what States made, nor whether plaintiffs maintain an office in the City of New York, and if they do maintain an office in that city, these defendants do not know for what purpose nor do these defendants know how the orders received at the Dallas office of plaintiffs are filled, nor do these defendants know what quantity of orders received at the Dallas office are filled by shipments from Dallas or from San Antonio, nor what quantity of said orders are filled from places outside of the State of Texas.

These defendants state that they do not know whether plaintiffs manufacture within the State of Texas, or whether they buy within the State of Texas any mineral oils or products refined from petroleum or any other goods, wares, merchandise for sale by them. These defendants state that they do not know whether plaintiffs only sell on orders received at Dallas and San Antonio goods, wares and merchandise which have been purchased by them in other
65 States than Texas, nor how orders received and accepted by plaintiffs are filled, nor whether the orders received by plaintiffs at Dallas or at San Antonio are filled by shipments of goods, wares and merchandise which have been purchased by plaintiff in other States than Texas and shipped to the customer direct from the place where purchased or which have been shipped to the plaintiffs from the place of purchase destined to Dallas or San Antonio, and there held by the plaintiffs in the original package unbroken until resold by them. These defendants further state that they do not know whether the chief items derived from the gross receipts are shipped in sealed drums, wood barrels or cases containing one gallon and five gallon tin cans of oil.

These defendants further state that they do not know whether plaintiffs have any storage tanks in Texas, and do not know whether plaintiffs receive any oil in Texas in tank cars, nor do they know whether plaintiffs fill any drums, barrels or cans with oil, nor do they know whether plaintiffs sell to their customers in the State of Texas in the original containers sealed in the factory and sold by them to their customers with the assurance that the merchandise is in the exact condition and sealed as when it left the factory. These defendants further state that they do not know what per cent of the business in Texas is derived from the sale of goods, wares and merchandise sold other than in their original containers, but accept as

true plaintiffs' statement that they do fill some orders from customers by pouring oil out of drums into ten gallon cans, transporting the same therein and pouring the oil therefrom into the
66 customers' tanks. These defendants demand that strict proof be made of all facts alleged in the sixth paragraph of plaintiffs' bill of complaint.

IX.

These defendants state that they do not know how the books of the plaintiffs at their Dallas and San Antonio places of business are kept, nor do they know that copies of all invoices made at Dallas and San Antonio to plaintiffs' customers are daily sent to plaintiffs' New York office, neither do they know if the books of account of plaintiffs are kept and all balances made at plaintiffs' New York office; neither do they know the purpose of plaintiffs in keeping their books and records at Dallas and San Antonio, neither do they know what disposition is made of the funds received by the plaintiffs at their Dallas and San Antonio offices; therefore, these defendants demand that strict proof be made of all allegations contained in the seventh paragraph of plaintiffs' bill of complaint.

X.

These defendants state that they do not know how much floor space is used by plaintiffs at their place of business in Dallas and San Antonio, neither do these defendants know how much real estate, if any, the plaintiffs own in the State of Texas, nor do they know how much property, if any, other than real estate, that plaintiffs own that is situated in the State of Texas, neither do they know whether they hold their merchandise in their Dallas and San Antonio places of business in unbroken packages, nor do they know what amount, if any, plaintiffs have paid since coming to Texas in ad valorem taxes; therefore, these defendants demand that strict proof be made of all allegations contained in paragraph eight of plaintiffs' complaint.

67 XI.

These defendants admit the correctness of all the statements made in paragraph nine of plaintiffs' bill of complaint.

XII.

Defendants admit the truth of the statements made in paragraph twelve of plaintiffs' amended bill.

XIII.

These defendants admit that plaintiffs have failed to make many of the reports required by this law, but how many, they are unable to state.

These defendants state that they do not know the exact amount due by plaintiffs to the State of Texas by reason of their having failed to pay the tax levied by the gross receipts tax law of this State, nor do they know the exact amount of penalties due the State from plaintiffs by reason of their having failed to comply with the provisions of the gross receipts tax law of this State.

These defendants allege that plaintiffs on or about the first day of January, 1919, paid to the State of Texas, the sum of $381.56, representing a tax of two per cent, upon $19,078.00, being the estimate of receipts of Sonneborn Brothers for wholesale business of oil done by them in Texas for the months of July, August and September, 1918; and that they filed an additional statement for the above months in the Comptroller's Department of the State of Texas on January 25, 1919, showing additional receipts in the amount of $3,169.09, paying a two per cent tax thereon, amounting to $62.00; for these two payments, Sonneborn Brothers hold receipts Numbers 1140 and 1141, issued by the Comptroller's Department of the State of Texas. These receipts show them to be paid in advance for the quarter beginning October 1, 1918.

68 On or about February 26, 1919, Sonneborn Brothers filed a statement showing their receipts for the months of October, November and December, 1918, to be $3,100.77, paying a tax of two per cent thereon, in the amount of $62.00, for which they hold receipt Number 1474, issued by the Comptroller's Department of the State of Texas, showing them to be paid in advance for the quarter beginning January first, 1919.

XIV.

These defendants admit the correctness of plaintiffs' statement contained in paragraph eleven of their bill of complaint.

XV.

These defendants deny that the Attorney General of the State of Texas is charged by this law with any special duty to bring suits for the recovery of this gross receipts tax, and state that his duties in respect thereof are merely the general duties imposed upon him by the Constitution and General Laws of the State of Texas to represent the interests of the State in suits brought for or against it. The defendants admit that said gross receipts tax law provides that, "the penalties provided for by this Act shall be recovered by the Attorney General in a suit brought by him in the name of the State of Texas."

Defendants admit that by the terms of said law, the Comptroller, if he has reason to believe or does believe that any individual company, corporation, association, receiver or receivers, subject to the provisions of the Act, has made a false return, or has failed or omitted to make a full return of gross receipts, or other statement of business done, required by any of the provisions of this Act, he shall report the same in writing to the Governor, and it shall be

69 the duty of the Governor to immediately require the Revenue Agent of the State of Texas to examine any books, papers or

documents, or other records or evidence showing or tending to show such unlawful act or omission."

Defendants deny that the Comptroller is required to call upon the plaintiffs for a report for each quarter and that when the plaintiffs shall fail to make the reports, the law denounces them as guilty of a criminal offense of the grade of a misdemeanor for failure to make each such report, and subjects them to prosecution therefor in the criminal court of Travis County.

Defendants state that by said law it is required that said Revenue Agent, "after checking the report made with such books, papers, documents or other records or evidence," shall make his report to the Comptroller and that, if it appears from said report "that any false or incorrect returns have been made, or that any individual, or the president, treasurer or superintendent of any company, corporation or association, or any member of any firm required by this Act to make reports has failed or omitted to make a full return, as required by law, then the Comptroller shall notify such individual, or the president, treasurer or superintendent of any company, corporation or association, or receiver, or receivers, of any company, corporation or association, or any member of any firm, to make forthwith an additional or supplemental report, and if any such individual, or the president, treasurer or superintendent of any company, corporation or association, or any member of a firm, or any receiver or receivers of any company, corporation or association making said original report shall fail or refuse to make said additional report or supplemental report, he shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than Two Hundred nor more than Five Hundred Dollars."

That by said law, it is also provided that if it appears from the report of the State Revenue Agent, or if the Comptroller has reason to believe, or does believe, that any individual, or any president, treasurer or superintendent of any company, corporation or association, or any receiver of any corporation or association, or any member of any firm, has willfully and deliberately made a false report, the Comptroller shall report the matter to the grand jury of Travis County.

That the foregoing are the only duties in respect to said law and the enforcement thereof specially charged upon the Comptroller.

That the Comptroller of Public Accounts is not charged by said law with any duty to demand and is not authorized to demand of plaintiffs, or either of them, to make any quarterly report, and, if plaintiffs or any one of them should refuse or omit to make such quarterly report, the Comptroller of Public Accounts is not authorized or required by said law to report such refusal or omission to the Attorney General of the State of Texas, and is not authorized or empowered to prosecute and can not, and will not, prosecute the plaintiffs for such refusal and omission to make a report for each quarter, and will not, and cannot subject the plaintiffs to repeated prosecutions in the criminal court of Travis County.

Defendants further state that neither of them can or will, under the provisions of this law, or of any existing law of the State of

Texas, prosecute plaintiffs, or either of them, for failure to make the quarterly reports required of them by this gross receipts
71 tax law. No such prosecution is provided by this law. Defendants state that this gross receipts tax law merely provides that if any person, company, corporation or association, or any receiver or receivers, failing to make report for thirty days from the date when said report is required by this Act to be made, shall forfeit and pay to the State of Texas a penalty of not exceeding one thousand dollars, which shall *ve* recovered by the Attorney General in a suit brought by him in the name of the State of Texas.

That neither the Attorney General nor the Comptroller can or will, under said law, commit any specific wrong to or trespass upon plaintiffs or their property.

XVI.

Defendants state that they are not sufficiently advised as to enable them to admit the correctness of the statements made in paragraph sixteen of plaintiffs' amended bill with reference to the statistics of the business done by plaintiffs; neither can these defendants admit or deny, for the reason that they are not sufficiently advised, the correctness of the statistics given in said paragraph sixteen with reference to the volume of sales made in the original package and those made from broken packages. Defendants do admit that the allegation made in the last sentence of paragraph sixteen of plaintiffs' amended bill is correct.

XVII.

Defendants admit the truth in the statements made in paragraph seventeen of plaintiffs' amended bill with reference to the tender of a check to the State Revenue Agent for $381.56, and also admit that the correspondence detailed in said paragraph is true and correct, but these defendants cannot admit, but specifically deny, that
72 plaintiffs did in good faith attempt to comply with said Act, or that the tender of the check for $381.56 was in payment in full of the taxes due the State of Texas by plaintiffs.

Defendants allege that plaintiffs knew that under the laws of Texas that they were due the State of Texas as taxes an amount far in excess of the amount tendered.

XVIII.

These defendants deny that plaintiffs have no adequate remedy at law, and they deny that plaintiffs are threatened with any trespasses or wrongs and deny that they will suffer in any way at the hands of the defendants herein, unless protected by writ of injunction issued out of this Honorable Court.

XIX.

Defendants admit that plaintiffs are able and willing to pay the sum of $330.99 as payment in full for all taxes due the State of

Texas by said plaintiffs, but these defendants show the court that said sum of $330.99 is but a fraction of the amount actually due under the law to the State of Texas by plaintiffs.

XX.

These defendants allege that plaintiffs are engaged in an intrastate business in making sale of their goods, wares and merchandise in the State of Texas, and are subject to the payment of the tax exacted by the Article 7377, Revised Civil Statutes of Texas, even though the goods so sold are delivered in the unbroken packages in which they were received by plaintiffs from states other than Texas.

XXI.

73 These defendants deny that complainants are entitled to any relief whatsoever or any part of the relief in said bill of complaint demanded, and allege that complainants have no standing in this Court or in any court of equity.

XXII.

And these defendants pray in all things the same benefits and advantages of this, their answer, as if they had pleaded or demurred said bill of complaint.

XXIII.

And these defendants deny all and all manner of unlawful acts whatsoever whereof they are in anywise by the said bill of complaint charged, all of which matters and things these defendants are ready and willing to prove as this Honorable Court shall direct. Therefore, these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

M. L. WIGINTON,
Comptroller of Public Accounts of the State of Texas.

C. M. CURETON,
In Propria Persona and as Attorney General of the State of Texas.
C. W. TAYLOR,
E. F. SMITH,
Assistant Attorneys General of the State of Texas, Solicitors for Defendants.

(Endorsed as follows, to-wit:) No. 64/305. In Equity. Sonneborn Bros. vs. C. M. Cureton et al. Amended Original Answer. Filed Oct. 14th, 1920. D. H. Hart, Clerk, by A. B. Coffee, Deputy. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

74 In the District Court of the United States for the Northern District of Texas, Austin Division, November Term, 1920.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON, Attorney General, et al.

Stipulation.

On this 19th day of October, A. D., 1920, it is hereby agreed by the parties to the above case that the following stipulation may be used on trial thereof. It is further agreed by the parties hereto that this stipulation is made and entered into for the purposes of this suit and that the same shall not be and is not binding upon the State of Texas in any litigation that may arise in the State Courts with reference to the collection of the tax that may be due by the said Sonneborn Brothers, and it is expressly agreed that the figures given in this stipulation are agreed to only for the purposes of this suit and shall not be considered for any purpose in any suit that may arise in the State Courts which the State of Texas may bring in order to collect the tax that may be due by said Sonneborn Brothers and the penalties for failing to pay said tax as by law is provided.

Sonneborn Brothers is a firm of merchants none of whom reside in Texas and whose citizenship and residence are correctly stated in the Amended Original Bill filed in September, 1920. The firm is engaged in selling petroleum products and maintains its principal office at 262 Pearl Street, New York City. On the first day of January, 1910, they opened an office at Dallas, Texas, and have
75 since that time maintained this office and a ware room connected therewith and have used rented storage space in a public warehouse at San Antonio, Texas. Since January 1, 1910, the firm, through orders received and accepted at its Dallas office, down to and including April 11th, 1919, while engaged in the business of wholesale dealers in coal oil, nap-tha, benzine and other mineral oils refined from petroleum, have made sales of such products from which they have received as gross receipts $860,801.50; all of the goods sold by them were collected for, and the receipts during this period accrued as stated in said amended original bill herein filed.

The $860,801.50 gross receipts included those from the sale of merchandise which when sold by Sonneborn Brothers was situated beyond the boundaries of Texas, as well as those arising from the sale of merchandise shipped by them into Texas and afterwards sold from their store rooms in original unbroken packages of importation as well as from broken packages. After the hearing of the applica-

tion for an interlocutory injunction Sonneborn Brothers separated their gross receipts from the commencement of their business in Texas down to April 11th, 1919, into three classes and extended two of these classes down to June 30th, 1920. From the beginning of their business down to June 30th, 1920, the gross receipts from goods imported by Sonneborn Brothers from other States into Texas before they were sold, which goods were afterwards sold by Sonneborn Brothers in Texas in the original unbroken packages in which they were imported was $217,179.10, 2 per cent of which is $4,343.58. During the same period, that is on and before June 30th, 1920, Sonneborn Brothers received gross receipts, from goods sold by them in Texas which had been imported from other States by Sonneborn Brothers and warehoused by them in Texas but of which the original package in which they had been imported had been broken before the sale was made, amounting to $16,549.84, 2 per cent of which is $330.99. All of the goods from which the gross receipts of
76 $217,179.10 and of $16,549.84 were received, were sold and delivered in Texas to purchasers residing in Texas and they were all sold after the arrival of the goods in Texas, no orders having been taken by plaintiffs for any of their goods before they arrived in Texas, and all these goods were sold out of the storage rooms of Sonneborn Brothers in Dallas and San Antonio, and all of them had been imported by Sonneborn Brothers into Texas and remained the property of Sonneborn Brothers continuously until sold by them. All of Sonneborn Brothers gross receipts mentioned or incident to their Texas business except the same $217,179.10 and the said $16,549.84 were realized from the sale of goods which when sold were not situated in Texas, or from goods which if they were in Texas when sold were shipped for delivery by Sonneborn Brothers to other States than Texas, on orders received from without the State of Texas.

Sonneborn Brothers have collected for all of the goods which they have sold in Texas.

On September 3, 1920, Sonneborn Brothers tendered to the Comptroller a report dated September 2, 1920, showing their gross receipts from goods sold in broken packages to be $16,549.84, and offered, if the Comptroller would receive the report to pay into the State Treasury $330.99 as the 2 per cent gross receipts tax on said sum. The Comptroller refused to receive the report on the ground that Sonneborn Brothers admitted that they had received as the gross receipts of all goods sold in Texas from their store rooms, which were brought into Texas before they were sold and before orders therefor had been received by them amounting to $233,728.94, on which the 2 per cent tax amounted to $4,674.58, and that he would not receive a partial report nor sanction the payment into the treasury of only the portion of the 2 per cent gross receipts tax which was calculated on the sales in broken packages.

77 It is admitted that the facts alleged in the eighth, ninth and tenth numbered paragraphs of the amended original bill filed in September, 1920, are true and that the correspondence set forth in the seventeenth paragraph of said bill was exchanged as

therein stated, and that the partially filled-in gross receipts tax statement blank form set out in the last mentioned paragraph accompanied the letter of H. B. Terrell, Comptroller dated May 23rd, 1919, set out therein.

(Signed) ETHRIDGE, McCORMICK & BROMBERG,
Solicitor- for Plaintiffs.

(Signed) C. M. CURETON,
Attorney General;

(Signed) E. F. SMITH,
Asst. Attorney General,
Solicitors for Defendants.

(Endorsed as follows, to-wit:) No. 64/305. Eq. Sonneborn Bros. v. C. M. Cureton et al. Stipulation. Filed Oct. 25, 1920. D. H. Hart, Clerk, by A. B. Coffee, Deputy. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

78 In the District Court of the United States for the Western District of Texas, at Waco.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON, Attorney-General, et al.

Final Decree.

On this November 23rd, 1920, come on to be heard on final hearing the above numbered and entitled cause, and the plaintiffs, Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund B. Sonneborn and Julius Roten, appeared by their solicitor. J. M. McCormick, Esquire, and the defendants, C. M. Cureton, Attorney-General of the State of Texas, and Mark L. Wiggongton, Comptroller of the state of Texas, appeared by their solicitor, E. F. Smith, Esquire, Assistant Attorney-General of the state of Texas;

Whereupon, the cause was submitted to the court upon the amended bill of the plaintiffs and the amended answer of the defendants and the stipulation filed herein, and the argument of counsel having been heard and the court having duly considered the facts alleged in the plaintiffs' first amended original bill and admitted in the defendant's amended answer as well as the facts set forth in such stipulation and the argument of counsel, the court is of the opinion and finds: First, that the plaintiffs are bound to make quarterly reports to the Comptroller of the gross receipts and amount uncollected from sales made by them in Texas of coal oil, nap-tha, benzine and

other mineral oils refined from petroleum which had been
79 transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the ordinary package of importation; second, that the plaintiffs are bound to pay two per cent tax on the gross receipts and amount uncollected from sales made by them in Texas of coal oil, nap-tha, benzine and other mineral oils refined from petroleum which had been transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of transportation into the State of Texas; and therefore the court is of the opinion that the plaintiffs are not entitled to the relief which they seek.

It is therefore ordered, adjudged and decreed, that the plaintiffs' said bill be, and the same is hereby, dismissed and the plaintiffs are decreed to pay to the defendants all costs incurred in this suit.

To which action of the court in dismissing the appeal and adjudging costs against them, the plaintiffs then and there in open court excepted and gave notice of appeal from this decree to the Supreme Court of the United States.

Dated the 23rd day of November, A. D. 1920.

(Signed) W. R. SMITH,
District Judge.

Ent. Vol. B, Page 157, Equity Journal.

(Endorsed as follows, to-wit:) No. 64/305. In Equity. Sonneborn Brothers, plaintiffs, vs. C. M. Cureton, Attorney-General, et al., Defendants. Final Decree. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

80 In the District Court of the United States for the Western District of Texas, at Waco.

In Equity.

No. 305.

SONNEBORN BROTHERS
vs.
C. M. CURETON, Attorney General, et al.

Statement of the Evidence on Appeal.

Be it remembered, That on the 23rd day of November, 1920, the above entitled cause came on for hearing before the Honorable W. R. Smith, United States District Judge for the Western District of Texas at Waco, and the plaintiffs appeared by their solicitors, Etheridge, McCormick & Bromberg, and defendants appeared by their

solicitor, E. F. Smith, Assistant Attorney-General of the State of Texas, and the following proceedings were had and done, to-wit:

The plaintiffs offered in evidence the stipulation, in words and figures as follows, to-wit:

81 In the District Court of the United States for the Northern District of Texas, Austin Division, November Term, 1920.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON, Attorney General, et al.

Stipulation.

On this 19th day of October, A. D., 1920, it is hereby agreed by the parties to the above case that the following stipulation may be used on trial thereof. It is further agreed by the parties hereto that this stipulation is made and entered into for the purposes of this suit and that the same shall not be and is not binding upon the State of Texas in any litigation that may arise in the State Courts with reference to the collection of the tax that may be due by the said Sonneborn Brothers, and it is expressly agreed that the figures given in this stipulation are agreed to only for the purposes of this suit and shall not be considered for any purpose in any suit that may arise in the State Courts which the State of Texas may bring in order to collect the tax that may be due by said Sonneborn Brothers and the penalties for failing to pay said tax as by law is provided.

Sonneborn Brothers is a firm of merchants none of whom reside in Texas and whose citizenship and residence are correctly stated in the Amended Original Bill filed in September, 1920. The firm is engaged in selling petroleum products and maintains its principal office at 262 Pearl Street, New York City. On the first day of January, 1910, they opened an office at Dallas, Texas, and have

82 since that time maintained this office and a ware room connected therewith and have used rented storage space in a public warehouse at San Antonio, Texas. Since January 1, 1910, the firm, through orders received and accepted at its Dallas office, down to and including April 11th, 1919, while engaged in the business of wholesale dealers in coal oil, nap-tha, benzine and other mineral oils refined from petroleum, have made sales of such products from which they have received as gross receipts $860,801.50; all of the goods sold by them were collected for, and the receipts during this period accrued as stated in said amended original bill herein filed.

The $860,901.50 gross receipts included those from the sale of merchandise which when sold by Sonneborn Brothers was situated

beyond the boundaries of Texas, as well as those arising from the sale of merchandise shipped by them into Texas and afterwards sold from their store rooms in original unbroken packages of importation as well as from broken packages. After the hearing of the application for an interlocutory injunction Sonneborn Brothers separated their gross receipts from the commencement of their business in Texas down to April 11th, 1919, into three classes and extended two of these classes down to June 30th, 1920. From the beginning of their business down to June 30th, 1920, the gross receipts from goods imported by Sonneborn Brothers from other States into Texas before they were sold, which goods were afterwards sold by Sonneborn brothers in Texas in the original unbroken packages in which they were imported was $217,179.10, 2 per cent of which is $4,343.58. During the same period, that is on and before June 30th, 1920, Sonneborn Brothers received gross receipts, from goods sold by them in Texas which had been imported from other States by Sonneborn Brothers and warehoused by them in Texas but of which the original package in which they had been imported had been broken before the sale was made, amounting to $16,549.84, 2 per cent of which is $330.99. All of the goods from which the gross receipts of
83 $217,179.10 and of $16,549.84 were received, were sold and delivered in Texas to purchasers residing in Texas and they were all sold after the arrival of the goods in Texas, no orders having been taken by plaintiffs for any of their goods before they arrived in Texas, and all these goods were sold out of the storage rooms of Sonneborn Brothers in Dallas and San Antonio, and all of them had been imported by Sonneborn Brothers into Texas and remained the property of Sonneborn Brothers continuously until sold by them. All of Sonneborn Brothers gross receipts mentioned or incident to their Texas business except the said $217,179.10, and the said $16,549.84 were realized from the sale of goods which when sold were not situated in Texas, or from goods which if they were in Texas when sold were shipped for delivery by Sonneborn Brothers to other States than Texas, on orders received from without the State of Texas.

Sonneborn Brothers have collected for all of the goods which they have sold in Texas.

On September 3, 1920, Sonneborn Brothers tendered to the Comptroller a report dated September 2, 1920, showing their gross receipts from goods sold in broken packages to be $16,549.84, and offered, if the Comptroller would receive the report to pay into the State Treasury $330.99 as the 2 per cent gross receipts tax on said sum. The Comptroller refused to receive the report on the ground that Sonneborn Brothers admitted that they had received as the gross receipts of all goods sold in Texas from their store rooms, which were brought into Texas before they were sold and before orders therefor had been received by them amounting to $233,728.94, on which the 2 per cent tax amounted to $4,674.58, and that he would not receive a partial report nor sanction the payment into

the treasury of only the portion of the 2 per cent gross receipts tax which was calculated on the sales in broken packages.

84 It is admitted that the facts alleged in the eighth, ninth and tenth numbered paragraphs of the amended original bill filed in September, 1920, are true and that the correspondence set forth in the seventeenth paragraph of said bill was exchanged as therein stated, and that the partially filled-in gross receipts tax statement blank form set out in the last mentioned paragraph accompanied the letter of H. B. Terrell, Comptroller dated May 23rd, 1919, set out therein.

(Signed) ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

(Signed) C. M. CURETON,
Attorney General;
E. F. SMITH,
Asst. Attorney General,
Solicitors for Defendants.

85 And the cause was submitted on this stipulation and on the amended original bill and the amended original answer.

The foregoing statement is agreed to as a correct statement under paragraph (*b*) of Equity Rule 75 and the lodgment thereof in the clerk's office for the examination of the defendants and notice of such lodgment and of the time when same will be presented to the Judge for approval, are hereby waived and the same may be approved by the Judge at once.

(Signed) ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

____ ____,
Solicitors for Defendants.

On this the 23rd day of November, 1920, the foregoing statement having been presented to me, the same is hereby in all things allowed and approved and the same is hereby ordered filed as a statement of the evidence to be included in the record of appeal in the above styled and numbered cause, as provided in paragraph (*b*) of the 75th Equity Rule.

____ ____,
United States District Judge.

(Endorsed as follows, to-wit:) No. 64/305. In Equity. Sonneborn Brothers vs. C. M. Cureton, Attorney-General, et al. Statement of Evidence on Appeal. Filed November 23rd, 1920. D. H. Hart, Clerk, by W. D. Rondthaler, Chief Deputy.

86 In the District Court of the United States for the Western District of Texas, at Waco.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON, Attorney-General, et al.

Assignment of Errors.

And now at the time of filing their petition for appeal and the allowance thereof, come Sonneborn Brothers, plaintiffs and appellants, and make and file their assignment of errors as follows:

I.

The court erred in dismissing the plaintiffs' bill.

II.

The court erred in finding that Sonneborn Brothers were required to make quarterly reports to the Comptroller of Public Accounts of their gross receipts and amount uncollected from sales made by them in Texas of coal oil, nap-tha, benzine and other mineral oils refined from petroleum which had been transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

III.

The court erred in finding that the plaintiffs were liable to pay the tax of two per cent on the gross receipts and amount un-
87 collected from sales made by them in Texas of coal oil, nap-tha, benzine and other mineral oils refined from petroleum which had been transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

IV.

The court erred in refusing to grant plaintiffs the injunction prayed for restraining the defendant, C. M. Cureton, Attorney-General, from attempting to enforce against plaintiffs compliance with

the gross receipts law constituting Article 7377 in respect to the gross receipts and amount uncollected from sales made by them in Texas of coal oil, nap-tha, benzine and other mineral oils refined from petroleum which had been transported by them into the State of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

V.

The court erred in refusing to grant plaintiffs the injunction prayed for restraining the defendant Mark L. Wiggington, Comptroller of the state of Texas, from attempting to enforce against plaintiffs compliance with the gross receipts law constituting Article 7377 in respect to the gross receipts and amount uncollected from sales made by them in Texas of coal oil, nap-tha, benzine and other mineral oils refined from petroleum which had been transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

88

VI.

For which errors found in the record and because of each of them, the plaintiffs below, now appellants, pray for a reversal of the decree of the District Court of the United States for the Western District of Texas entered in this cause dismissing their bill and refusing to grant them the relief prayed for therein, and the appellants pray for such other relief as they may be entitled to.

(Signed) ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Sonneborn Brothers.

(Endorsed as follows, to-wit:) No. 64/305. In Equity. Sonneborn Brothers vs. C. M. Cureton, Attorney General et al. Assignment of Errors. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

89 In the District Court of the United States for the Western District of Texas, at Waco.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON, Attorney-General, et al.

Petition for Appeal.

The above named plaintiffs, Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund B. Sonneborn and Julius Roten, conceiving themselves aggrieved by the decree, order and judgment entered in the above entitled cause on November 23rd, 1920, hereby appeal from said decree, order and judgment to the Supreme Court of the United States, and they pray that their appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

And now at the time of the filing of this petition for appeal, the said appellants file an assignment of errors setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

Wherefore, the said Sonneborn Brothers, a firm composed as aforesaid, plaintiffs and appellants, pray that their appeal be allowed.

(Signed) ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Sonneborn Brothers, Plaintiffs and Appellants.

90 And now, to-wit, on this 23rd day of November, A. D. 1920, at Waco, it is ordered that the appeal prayed for in the foregoing petition be, and the same is hereby, allowed as therein prayed for.

(Signed) W. R. SMITH,
United States District Judge.

(Endorsed as follows, to-wit:) No. 64/305. In Equity. Sonneborn Brothers vs. C. M. Cureton, Attorney General, et al. Petition for Appeal. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

91 In the District Court of the United States for the Western District of Texas, at Waco.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON, Attorney General, et al.

Appeal Bond.

Know all men by these presents: That we, Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund F. Sonneborn and Julius Roten, as principals, and the other subscribers hereto as sureties, are held and firmly bound unto C. M. Cureton, Attorney General of the State of Texas, and Mark L. Wiggington, Comptroller of the State of Texas, in the full and just sum of five hundred dollars, to be paid to the said C. M. Cureton, Attorney General of the State of Texas, and to the said Mark L. Wiggington, Comptroller of the State of Texas, their heirs, legal representatives, successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally, firmly by these presents.

Signed with our seals and dated this 23rd day of November, A. D. 1920.

Whereas, in the United States District Court for the Western District of Texas, Waco Division, in a suit pending in said court between Sonneborn Brothers, a firm composed of Ferdinand Sonne-
92 born, Sigmund F. Sonneborn and Julius Roten, plaintiffs, and C. M. Cureton, Attorney General of the State of Texas, and Mark L. Wiggington, Comptroller of the State of Texas, defendants, numbered 305, a decree was rendered against the said plaintiffs, Sonnegorn Brothers; and

Whereas, the above named Sonneborn Brothers, a firm composed as aforesaid, have prosecuted an appeal to the Supreme Court of the United States to reverse said decree rendered in the above entitled suit dismissing their bill and denying them the injunction prayed for therein;

Now, therefore, the consideration of this obligation is such that if the above named Sonneborn Brothers, a firm composed as aforesaid, shall prosecute said appeal to effect and answer all damages and

costs if they fail to make such appeal good, then this obligation shall be void; otherwise, same shall remain in full force and virtue.

(Signed) SONNEBORN BROTHERS,
By H. L. BROMBERG,
Their Atty. and Agent,
Principals.

F. M. ETHERIDGE,
J. M. McCORMICK,
Sureties.

Approved November 23rd, 1920.
W. R. SMITH,
United States District Judge.

93 STATE OF TEXAS,
County of Dallas, ss:

Before me, Myrtle Crouch, a Notary Public in and for Dallas County, Texas, on this day personally appeared J. M. McCormick and F. M. Etheridge, each known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed; and each being by me duly sworn stated that he is the owner of unincumbered real estate situate in the State of Texas of greater value than the sum of One Thousand Dollars.

Given under my hand and seal of office this 22nd day of November, A. D. 1920.

(Signed) MYRTLE CROUCH,
Notary Public in and for Dallas County, Texas.

STATE OF TEXAS,
County of Dallas, ss:

Before me, Myrtle Crouch, a Notary Public in and for Dallas County, Texas, on this day personally appeared H. L. Bromberg, known to me to be the person whose name is subscribed to the foregoing instrument as attorney and agent for Sonneborn Brothers, and acknowledged to me that he executed the same for the
94 purposes and consideration therein expressed as the act and deed of Sonneborn Brothers, and being by me first duly sworn stated on oath that he was duly authorized by Sonneborn Brothers to execute the said bond in their name and on their behalf.

Given under my hand and seal of office this 22nd day of November, A. D. 1920.

(Signed) MYRTLE CROUCH,
Notary Public in and for Dallas County, Texas.

(Endorsed as follows, to-wit:) No. 64/305. In Equity. Sonneborn Brothers vs. C. M. Cureton, Attorney-General, et al. Appeal Bond. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

95 In the District Court of the United States for the Western District of Texas, at Waco.

In Equity.

No. 305.

SONNEBORN BROTHERS

vs.

C. M. CURETON, Attorney General, et al.

Agreement as to Documents Which Shall Constitute the Record on Appeal.

The parties hereto, waiving præcipe, have agreed that the following documents shall constitute the record on appeal:

1. Plaintiffs' original bill;
2. Defendants' original answer;
3. Decree of the court refusing to grant an interlocutory injunction;
4. Opinion of the court refusing the interlocutory injunction;
5. Plaintiffs' amended original bill;
6. Defendants' amended original answer;
7. Stipulation;
8. Final decree;
9. Statement of the evidence on appeal;
10. Assignment of errors;
11. Petition for appeal and allowance thereof;
12. Appeal bond;
13. Agreement as to papers composing the record;
14. Cost Bill.
15. Certificate of Clerk.

(Signed) ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiffs.

(Signed) C. M. CURETON,
C. W. TAYLOR, &
E. F. SMITH,
Solicitors for Defendants

(Endorsed as follows, to-wit:) No. 64/305. In Equity. Sonneborn Brothers vs. C. M. Cureton, Attorney-General, et al. Agreement as to Documents which shall constitute the Record of Appeal. Filed 23 day of November, 1920. D. H. Hart, Clerk, by Mrs. A. F. Brin, Deputy.

96 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States, in and for the Western District of Texas, do hereby certify that the foregoing on 95 pages, numbered from 1 to 95, is a true and correct transcript of proceedings had and orders entered as therein stated, in cause No. 64/305 Equity, In the Matter of Sonneborn Brothers, Complainants vs. C. M. Cureton, as Attorney General of the State of Texas, and H. B. Terrell, as Comptroller of the State of Texas, Defendants, as the same appear on file and of record in this office.

And I do further certify that the foregoing record embraces only such pleadings, process and orders, as are specified in the Agreement as to Documents which shall constitute the Record on Appeal filed by the parties herein.

Witness my official signature and the seal of said United States District Court, at office in the City of Waco, Texas, this 13th day of December, 1920.

[The Seal of the U. S. District Court, Western Dist. Texas, San Antonio.]

D. H. HART,
Clerk,
By W. D. RONDTHALER,
Chief Deputy Clerk.

Endorsed on cover: File No. 28,022. W. Texas D. C. U. S. Term No. 665. Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund B. Sonneborn, and Julius Roten, appellants, vs. C. M. Cureton, attorney general of the State of Texas, and Mark L. Wiggington, comptroller of the State of Texas. Filed December 27th, 1920. File No. 28,022.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. ~~101.~~ 20

SONNEBORN BROTHERS, A FIRM COMPOSED OF FERDINAND SONNEBORN, SIGMUND V. SONNEBORN, AND JULIUS ROTEN, APPELLANTS,

v.

C. M. CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND MARK L. WIGGINGTON, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

APPELLANTS' MOTION FOR THE SUBSTITUTION OF PARTIES DEFENDANT.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellants.

(28,022)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 191.

SONNEBORN BROTHERS, A FIRM COMPOSED OF FERDINAND SONNEBORN, SIGMUND V. SONNEBORN, AND JULIUS ROTEN, APPELLANTS,

v.

C. M. CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND MARK L. WIGGINGTON, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

APPELLANTS' MOTION FOR THE SUBSTITUTION OF PARTIES DEFENDANT.

Motion to Substitute as Appellees.

WALTER A. KEELING, present Attorney General of the State of Texas, in the place of C. M. CURETON, former Attorney General of the State of Texas, and

LON A. SMITH, present Comptroller of Public Accounts of the State of Texas, in the place of MARK L. WIGGINGTON, former Comptroller of Public Accounts of the State of Texas.

Come now Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund V. Sonneborn, and Julius Roten, appellants, by their counsel, and, suggesting to the court the retirement from office of the original defendants herein and the appointment, qualification, and assumption of office of their successors, respectfully move the court that substitution as appellees in this cause be made as follows, to wit:

Walter A. Keeling, present Attorney General of the State of Texas, in the place of C. M. Cureton, former Attorney General of the State of Texas, and Lon A. Smith, present Comptroller of Public Accounts of the State of Texas, in the place of Mark L. Wiggington, former Comptroller of Public Accounts of the State of Texas.

The above-entitled suit was brought June 21, 1919, against C. M. Cureton, then Attorney General of the State of Texas, and Henry B. Terrell, then Comptroller of Public Accounts of the State of Texas, as defendants. Pending the suit in the lower court, Henry B. Terrell ceased to be Comptroller of Public Accounts of the State of Texas and was succeeded in said office by Mark L. Wiggington, who was made defendant in substitution for Henry B. Terrell in an amended bill.

The purpose of the bill was to restrain prosecutions and actions by the Attorney General of the State of Texas and against the plaintiffs in the attempted enforcement against the plaintiffs of the gross-receipts tax law of the State of Texas, because, as plaintiffs claim, the said law imposes a burden on interstate commerce carried on by the plaintiffs, in violation of Section 8 of Article 1 of the Constitution of the United States, and deprives them of due process of law and equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

The case was submitted to the lower court on a stipulation as to the facts, and the lower court dismissed the plaintiffs' bill on the merits, whereupon an appeal was prayed for and allowed the appellants and the case brought to this court.

The said original appellees, C. M. Cureton, Attorney General of the State of Texas, and Mark L. Wiggington, Comptroller of Public Accounts of the State of Texas, were made parties herein solely in their respective official capacities, and pending the appeal in this court have vacated their respective offices and been succeeded therein by the respective persons sought to be substituted by this motion. This suit was brought for the purpose of securing an injunction against the Attorney General of the State of Texas and against the Comptroller of Public Accounts of the State of Texas, and this motion is founded on Article 2099-*a* of the Revised Statutes of the State of Texas of 1911, which reads as follows:

> "Hereafter when any suit in mandamus or injunction is brought against any person holding any public office, in this State, in his official capacity, and after final trial and judgment in the trial court, and notice of appeal to the Court of Appeals or Supreme Court has been given in such cause, and if such person for any reason should vacate such public office, such suit shall not abate but his successor to such office may be made a party thereto by a motion setting out such facts and showing in such motion that he has demanded such successor to such office to do or to refrain from doing such official act as such suit is based upon and such successor has failed or refused to comply with such demand, and duly verified, by any person or his attorney, who is a party to such suit, and file the same in the court in which such suit is pending, giving the name and location of such successor" (acts 1917, ch. 158, sec. 1).

The appellants, through their solicitor who verifies this motion, have demanded that Honorable Walter A. Keeling, Attorney General of the State of Texas, and Honorable Lon A. Smith, Comptroller of Public Accounts of the State of Texas, refrain from doing the official acts sought to be enjoined in this suit against their predecessors in office respectively, and said Walter A. Keeling and Lon A. Smith have and each of them has refused to comply with such demand.

Said Walter A. Keeling, Attorney General of the State of Texas, resides at Austin, in Travis County, in the State of Texas, and the said Lon A. Smith, Comptroller of Public Accounts of the State of Texas, also resides at Austin, in Travis County, in the State of Texas.

Wherefore appellants pray that the substitution herein moved be granted, and, as in duty bound, will ever pray.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Appellants.

FEBRUARY 8*th*, 1922.

STATE OF TEXAS,
County of Dallas, ss:

Before the undersigned authority on this day personally appeared J. M. McCormick, who, being first duly sworn, says on oath that he is one of the solicitors for the appellants in

the above numbered and entitled cause and has read the foregoing motion, and that the facts therein set forth are true, and further affiant saith not.

J. M. McCORMICK.

Subscribed and sworn to by said J. M. McCormick before me on this 8th day of February, A. D. 1922.

[Seal of Notary Public, County of Dallas, Texas.]

C. K. BULLARD,
Notary Public, Dallas County, Texas.

Due service of the foregoing motion and receipt of a copy thereof hereby admitted this 6th day of February, A. D. 1922, and consent and agree that the motion may be granted.

WALTER A. KEELING,
E. F. SMITH,
Solicitors for Defendants and Appellees.

[Endorsed:] 28022. No. 191. In the Supreme Court of the United States, October Term, 1921. Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund V. Sonneborn, and Julius Roten, appellants, *v.* C. M. Cureton, Attorney General of the State of Texas, and Mark L. Wigington, Comptroller of Public Accounts of the State of Texas, appellees. Appellants' motion for the substitution of parties defendant. Etheridge, McCormick & Bromberg, Attorneys-at-Law, Dallas, Texas.

SUPREME COURT OF THE UNITED STATES

October Term, 1920.

No. [redacted]20

SONNEBORN BROTHERS, A FIRM COMPOSED OF FERDINAND SONNEBORN, SIGMUND B. SONNEBORN, AND JULIUS ROTEN, APPELLANTS.

vs.

C. M. CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND MARK L. WIGGINGTON, COMPTROLLER OF THE STATE OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellants.

I.

SUBJECT INDEX AND LIST OF CASES.

II.

SUBJECT INDEX AND LIST OF CASES—Continued.

SUPREME COURT OF THE UNITED STATES

October Term, 1920.

No. 665.

SONNEBORN BROTHERS, A FIRM COMPOSED OF FERDINAND SONNEBORN, SIGMUND B. SONNEBORN, AND JULIUS ROTEN, APPELLANTS.

vs.

C. M. CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND MARK L. WIGGINGTON, COMPTROLLER OF THE STATE OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

For years Sonneborn Brothers have been, and are now, doing the business of wholesale dealers in mineral oils refined from petroleum, as defined by an article of the Texas statutes levying a gross receipts tax on such

dealers. They neither buy nor manufacture goods in Texas, but rent and maintain an office and use rented warehouse space at Dallas, Texas, and for a time used some warehouse space at San Antonio, Texas. The article of the Texas statutes defining wholesale dealers in mineral oils refined from petroleum, which was first enacted in 1905 and amended in 1907, provides for a tax equal to two per cent of the gross receipts and amount uncollected from sales of such dealers in Texas, and relevant articles require them to make quarterly returns under oath of their gross receipts, prescribe penalties for failure to make the returns and other penalties for failure to pay the tax. A dealer who fails to make the return and pay the tax is denied a permit, without which he is forbidden to do business, and if a permit has issued to him which has not expired, it is suspended. Severe cumulative criminal and civil pains and penalties for failure to make the return and pay the tax are also provided.

When the original bill was filed a controversy existed between Sonneborn Brothers and the state officers charged with the duty of enforcing collection of the tax, Sonneborn Brothers claimed that they were not subject to the tax in respect of any of their sales, and the officers claimed that all of the sales were so subject. Before the amended bill herein was filed the officers conceded that the tax was not payable on gross receipts from the sale of goods brought by Sonneborn Brothers into Texas from other states and sold by them in Texas in unbroken original packages without being warehoused there, and Sonneborn Brothers conceded that on the gross proceeds from the sales of goods brought into Texas and sold there after the original package had been broken

the tax was collectable. They offered the tax accruing according to their concession, but the officers refused to receive this tax so offered, claiming that Sonneborn Brothers should pay in solido the tax on the gross receipts both of goods brought by them from other states into Texas and sold by them in unbroken original packages which Sonneborn Brothers had placed in the original package in one of their warehouses located in Texas before the sale, and of goods the original package of which had been broken before the sale. Sonneborn Brothers denied the right to collect the tax on the gross receipts from the sale of the goods sold in the unbroken original package solely because the package had been held temporarily in a warehouse in Texas. They then brought their amended bill to enjoin the enforcement of the penalties for failing to report the sale of, and to pay the tax on the gross proceeds of the sale of, goods sold in the original package, even though such package had been temporarily warehoused before sale; and they invoked the protection of section 8, article 1, of the Federal Constitution and of section 1 of the 14th amendment thereto, and prayed for an appropriate injunction, relying on the decision of this court in Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, and on the decision of the supreme court of Texas in Houston Belt & Terminal Ry. Co. v. Texas, 108 Texas 314.

On final hearing the court refused the injunction and dismissed the bill.

The only question brought before this court is whether, without infringing section 8, article 1, of the Federal Constitution, and section 1 of the 14th amendment thereof, the state may collect a tax equal to two per cent of the gross receipts and amount uncollected from

sales made by Sonneborn Brothers in Texas of goods brought by them into Texas from other states, which they temporarily held in their warehouse in Texas in the unbroken original package in which such goods were brought into the state, for sale in the unbroken original package, and which in due course they sold in the unbroken original package to purchasers who accepted delivery in Texas.

STATEMENT OF THE ERRORS RELIED ON.

I.

The court erred in dismissing the plaintiff's bill.

II.

The court erred in finding that Sonneborn Brothers were required to make quarterly reports to the comptroller of public accounts of their gross receipts and amount uncollected from sales made by them in Texas of coal oil, naptha, benzine and other mineral oils refined from petroleum which had been transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

III.

The court erred in finding that the plaintiffs were liable to pay the tax of two per cent on the gross receipts and amount uncollected from sales made by them in Texas of coal oil, naptha, benzine and other mineral oils refined from petroleum which had been transported

by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

IV.

The court erred in refusing to grant plaintiffs the injunction prayed for restraining the defendant, C. M. Cureton, attorney general, from attempting to enforce against plaintiffs compliance with the gross receipts law constituting article 7377 in respect to the gross receipts and amount uncollected from sales made by them in Texas of coal oil, naptha, benzine and other mineral oils refined from petroleum which had been transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

V.

The court erred in refusing to grant plaintiffs the injunction prayed for restraining the defendant Mark L. Wiggington, comptroller of the state of Texas, from attempting to enforce against plaintiffs compliance with the gross receipts law constituting article 7377 in respect to the gross receipts and amount uncollected from sales made by them in Texas of coal oil, naptha, benzine and other mineral oils refined from petroleum which had been transported by them into the state of Texas in packages before plaintiffs had sold or accepted orders for the sale of the same, which were warehoused in Texas

by plaintiffs and afterwards sold by plaintiffs in Texas in the original package of importation.

For which errors found in the record and because of each of them, the plaintiffs below, now appellants, pray for a reversal of the decree of the district court of the United States for the western district of Texas entered in this cause dismissing their bill and refusing to grant them the relief prayed for therein, and the appellants pray for such other relief as they may be entitled to.

ARGUMENT.

1. The Texas gross receipts tax law of 1907, as applied to the sale of merchandise brought by appellants into Texas and sold by them there in the unbroken original package, is annulled by section 8, article 1, of the Federal Constitution, because it imposes a direct burden on interstate commerce.

In 1905 the legislature of Texas passed a sweeping gross receipts tax act, the pertinent portion of which we here set out:

ACT OF 1905.

> "Each and every person, association of persons or corporation created by the laws of this or any other state or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents, in this state, in the wholesale business of coal oil, naptha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent upon their gross receipts from any and all sales in this state of any of said articles in section 9 of this act hereinabove mentioned, and an annual tax of two per cent of the cash market value of

any and all of said articles that may be received or possessed or handled or disposed of in any manner other than by sale in this state; and it is hereby expressly provided that delivery to or possession by any person, association of persons or corporation in this state of any of the articles hereinabove mentioned in section 9 of this act, from whatever source the same may have been received, shall for the purpose of this act be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will and shall subject the same to the tax herein provided for. Said tax herein provided for shall be paid to the state Treasurer quarterly, and every such person, agent, association of persons, or corporation so owning, controlling or managing such business shall, on or before the first day of April, and quarterly thereafter, report to the Comptroller under oath of the president, treasurer, superintendent or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this state. Should any person, association of persons or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay said taxes for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars. Each and every day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officers or agents so failing, shall forfeit and pay to the state the sum of twenty-five dollars for each day said re-

port and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General in the name of the state. For the purpose of suits and prosecutions provided for in this article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis county, and service may be had upon any officer or agent of such company or corporation in the state, and such service shall in all respects be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law." (General Laws of Texas, 29th Legislature, 1905, Chapter 148, Section 9, page 364, Gammel, Vol. 12.)

The gross receipts tax **law of 1905** included railroads, and as regards them, was stricken in Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas, 210 U. S. 217, decided May 18, 1908. While that case was pending the gross receipts tax **law of 1907** was passed, which does not include railroads, leaving them covered by the law of 1905, but embraces **terminal railroads. The act of 1907,** amended the **law of 1905** as regards **wholesale dealers in petroleum oils** by displacing the section of the law of 1905 hereinbefore set out and, in lieu of it, provides:

ACT OF 1907.

"Each and every company, individual, corporation, or association created by the laws of this state, or any other state or nation, which shall engage in his own name, or in the name of others or in the name of its representatives or agents in this state in the business of wholesale dealers in coal oil, naptha, benzine or any other mineral oils refined from petroleum, shall make quarterly, on the first day of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superin-

tendent of such company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this state of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations at the time of making said report, shall pay to the Treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to two per cent of said gross receipts and amount uncollected from said sales as shown by said report. A wholesale dealer, within the meaning of this article, is any individual, company, firm, partnership, corporation or association who buys any of the articles hereinbefore mentioned, either in his own name or in the name of others, or in the name of their representative or agent, and sells either in his own name, or in the name of others, or in the name of their representatives or agents to any person, firm, corporation or association to be sold again."

The above is section 9 of the law of 1907, general laws, of the first called session of 30th legislature, chapter 18, page 484, approved May 16, 1907, 13 Gammel, and now appears as article 7377 of the Revised Statutes of Texas, and is the authority for imposing the tax, the validity of which is controverted herein.

The facts are stipulated. (R. 56.) Briefly stated, they are that appellants have their chief office in New York City. On January 1, 1910, they opened an office at Dallas, which they have since maintained, and have a warehouse connected with it. They have used some rented space at San Antonio, Texas. Since January 1, 1910, they have sold petroleum products from which they have received as gross receipts $860,801.50, and they have collected for all goods sold by them. From the beginning of the business down to June 30, 1920, Son-

neborn Brothers' gross receipts from goods imported by them from other states into Texas before they were sold which were afterwards **sold by them in Texas in the original unbroken packages** in which they were imported, amounted to $217,179.10, two per cent of which is $4343.58. During the same period Sonneborn Brothers' gross receipts from goods sold by them in Texas which had been imported from other states by them and warehoused by them in Texas, of which the original packege in which they had been imported **had been broken before the sale,** amounted to $16,549.84, two per cent of which is $330.99. All goods on which the gross receipts of $217,179.10 and of $16,549.84 accrued, were sold and delivered in Texas to purchasers residing in Texas, and all were sold after the arrival of the goods in Texas as no orders had been taken by appellants for any of them before they arrived in Texas. All of these goods were sold out of the storage room of Sonneborn Brothers either at Dallas or at San Antonio, and all of them had been shipped by Sonneborn Brothers into Texas and remained their property continuously until sold by them. The other gross receipts of Sonneborn Brothers mentioned as incident to their Texas business accrued from the sale of goods, which were not in Texas when sold, or from goods which, if in Texas when sold, were shipped for delivery to other states than Texas, on orders received from persons outside of Texas.

The $330.99, two per cent tax on the gross receipts from sales in broken packages, was offered and refused. This tax would have been paid but for the refusal of the state officers who demanded $4674.58, which included as well the $4343.58 as two per cent tax on the gross receipts from goods sold in unbroken original packages. (R. 57.)

The facts alleged in 8th, 9th and 10th paragraphs of the amended bill are admitted. (R. 58.) They are:

"The plaintiffs have constantly conducted their business in the state of Texas through a manager and salesmen traveling from the Dallas office for the purpose of taking orders and through one salesman traveling from San Antonio, for the same purpose. These salesmen solicited in Texas, Louisiana, Arkansas, Oklahoma, New Mexico and less frequently in other states, orders for plaintiffs' wares. The orders when taken were sent to the office at Dallas for acceptance, and when accepted were usually approved by the manager at Dallas, but at times when the order was for a large quantity the question of credit was referred to and passed upon by plaintiffs' credit department at their office in the city of New York maintained for that and other purposes. Orders were also received at the Dallas office direct from customers in Louisiana, Oklahoma, Texas and New Mexico. When these orders were accepted they were sometimes filled by shipments from Dallas, sometimes by shipments from San Antonio, and sometimes by shipments directly from the factories or refineries of I. Sonneborn Sons, Incorporated, situated at Nutley, in the State of New Jersey, and at Petrolia, in the state of Pennsylvania, from whom the plaintiffs purchased all of the naptha, benzine, coal oils and other mineral oils and petroleum products which they have sold and delivered in Texas. The plaintiffs have neither manufactured in Texas, nor bought in Texas, any benzine, naptha, coal oils and other mineral oils or products refined from petroleum, or any other goods, wares or merchandise sold by them. They have only sold at Dallas or on orders received there and at San Antonio, or on orders received there, and at any other place in Texas on orders or otherwise, goods, wares and merchandise which had been purchased by them in other states than Texas, and which after being so purchased had

been shipped to the customer directly from the place where purchased by the plaintiffs, after the purchase, or which had been shipped from the place of purchase to the plaintiffs at Dallas or at San Antonio, and there held by the plaintiffs in the unbroken original package of importation until sold by them except as hereinafter shown in this paragraph. The oils which were the chief items from which plaintiffs have derived gross receipts, were always shipped either in sealed drums, wood barrels or cases containing one gallon and five gallon tin cans of oil, which drums, wood barrels and cases constituted the original package. The plaintiffs have had no storage tanks in Texas, have received no oil in Texas in tank cars, nor have they, in Texas, filled any drums, barrels or cans with oil, but they have sold only in the original containers, sealed at the factory, and sales by them to their customers were with the assurance that the merchandise was in the exact condition as when it left the factory, and that the sealed container was sealed at the factory and not elsewhere, which assurance was true in every instance.

The plaintiffs have very infrequently, for the accommodation of a customer who habitually bought a larger quantity, and as an incident to their business as wholesale dealers in unbroken packages of imported oils, varied their method of doing business to the extent of pouring oil out of a drum into a ten gallon milk can, which in turn would be emptied into the tank of the customer, and they have likewise sometimes broken a case to sell one can of oil as an accommodation to a customer usually buying in a larger quantity, but this practice has not occurred frequently, and the sales so made have been purely incidental and have constituted approximately one and ninety-two hundredths per cent of the plaintiffs' total business in Texas, and the gross revenue arising therefrom has constituted approximately one and ninety-two hundredths per cent of the total gross receipts

from all of the plaintiffs' business, and the gross receipts from sales so made in broken packages have amounted to approximately seven and eight one hundredths per cent of plaintiffs' gross receipts from all sales in broken and unbroken packages, where the goods were brought into Texas before they were sold and were then sold and delivered in the State of Texas. That these sales in broken packages were not sold at wholesale but were all retail sales of small quantities made without a view to profit and the gross receipts derived by plaintiffs from said sales in broken packages included no profit." (Par. 8, Rec. 32-34.)

"Whenever a sale has been made by the plaintiffs on an order received at Dallas or at San Antonio, a record of the sale has been made in ledgers kept by the plaintiffs at Dallas or at San Antonio, in order to enable plaintiffs promptly to render statements to customers. Copies of all invoices made at Dallas or San Antonio to plaintiffs' customers have been sent daily to the plaintiffs' New York office, where the books of account of the plaintiffs have been kept and all trial balances made. The purpose of keeping these records at Dallas (and formerly at San Antonio) was merely to enable the plaintiffs promptly to give information to customers, and thereby avoid the delay incident to securing the information from the New York office. All information pertaining to salesmen's commissions, to profits and all other data from the books than the condition of customers' account has been obtainable only at the New York office. All funds received by plaintiffs at their Dallas office were deposited in a bank at Dallas to plaintiffs' credit, subject to checks thereon drawn only at their New York office, and all funds received by the plaintiffs at San Antonio, were deposited in a bank there to the plaintiffs' credit, likewise subject to checks drawn only at their New York office, and no agent of plaintiffs living in Texas has had authority to check against either account, and no other bank in Texas

has received deposits of receipts from the plaintiffs' Texas business, or any other funds of plaintiffs." (Par. 9, Rec. 34.)

"The plaintiffs have rented one floor in a four story building at Dallas, used as an office and storeroom, and they have used for the storage at San Antonio space in a public warehouse. They never have owned, and do not now own real estate in the State of Texas, nor any property located there save money and the credits which from time to time arose in said banks in course of transmission of funds to the plaintiffs in New York; such merchandise as they have imported into the state and held in their storage room at Dallas and in said public storage house at San Antonio, for sale in original unbroken packages, (except as hereinbefore stated); one Ford car; and certain office furniture and fixtures of small value.

On their said property situated in Texas, including merchandise in storage on January 1st of each year, on which day the assessment and levy is effective, the plaintiff's have paid ad valorem taxes for the years and in amounts, as follows:

City Taxes.

1911	$52.78
1912	69.12
1913	52.80
1914	35.15
1915	75.05
1916	69.35
1917	76.55
1918	166.73
1919	198.78 and

State and County Taxes.

1912	$31.09
1913	28.00
1914	29.00
1915	52.80
1916	34.96
1917	51.47
1918	53.04
1919	116.32''

(Par. 10, Rec. 34-35.)

It is also admitted that the correspondence set forth in the 17th paragraph of the amended bill (R. 38-39) was exchanged, as stated, and that the partially filled-in gross receipts tax statement blank incorporated therein accompanied one of the letters of the comptroller. This correspondence shows in effect that the state officers were demanding quarterly returns on **all** of the gross receipts of appellants in Texas on a form requiring a return under oath of **all** of the gross receipts quarterly, and that the demand was for the payment of the tax **upon any and all sales made in Texas.** (R. 38-41.)

Under section 16 of the law of 1907 a suit was brought by the state to collect the gross receipts tax from a terminal railroad company imposed by that section. This suit finally came before the supreme court of Texas and was decided against the validity of the tax on the authority of Galveston, Harrisburg & San Antonio Railway Company vs. Texas, 210 U. S., 217, which, as we have said, arose under the law of 1905. The vice in both laws pointed out by those decisions is that the tax bears directly on the gross receipts from interstate commerce.

Therefore, if the tax, the validity of which is now before this court, is levied on gross receipts arising directly out of a transaction which is itself interstate commerce, it must fail under the previous rulings of this court, and of the supreme court of Texas, on the gross receipts tax laws of 1905 and 1907, as they affect gross receipts of railroad companies from transactions in interstate commerce.

2. The tax is levied on the gross receipts from transactions in interstate commerce.

As early as Brown vs. Maryland, 12 Wallace, 419, this court decided that the protection accorded to merchandise coming from a foreign country and sold by the importer in the unbroken original package, attended the imported article until the sale was accomplished, although before the sale the importing owner warehoused the unbroken original package. The demarking line was fixed so as to include the sale of the unbroken package by the importer, within the stream of foreign commerce. The sale was held to be itself a transaction in foreign commerce, and thus beyond the taxing or regulatory power of the state. This court makes a distinction between the limitations on the power of the state to tax or regulate imports from foreign countries held by the importer in the unbroken original package, and the power to tax or regulate packages of interstate commerce brought by the owner from one state into another and held in the original package for sale. The distinction arises from the different language employed in the applicable provisions of the Federal Constitution. Section 8 of article 1 is held to be consistent with the levy by the state of an undiscriminating tax on the unbroken package in the hands of the owner, and with

a fixed tax on an occupation consisting in large part of selling such packages, just as an equal state tax on the roadbed and equipment within the state of a carrier is permitted, though used in interstate commerce.

American Steel & Wire Company vs. Speed, 192 U. S., 500, reviews the authorities and draws the distinction between the classes of cases illustrated respectively by Brown vs. Maryland, 12 Wallace, 419, and Woodruff vs. Parham, 8 Wallace, 123, which is in substance that neither an ad valorem tax, nor a fixed occupation tax **directly** affects commerce, and so can be applied to interstate commerce which is protected only against the burden of a direct tax, whereas, the state has no right to tax imports even **indirectly**. Chief Justice White, speaking for the court in American Steel & Wire Company against Speed, said:

> "Thus, in Brown vs. Maryland, there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. Woodruff vs. Parham and Brown vs. Houston, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in Brown vs. Maryland—that is, sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as inter-

state commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In Leisy vs. Hardin and Lyng vs. Michigan the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases."

So, clearly, the interstate character of the commerce continues until the importer sells the original package or breaks it, and the sale of each unbroken original package is a transaction of interstate commerce. **Under the Texas law this sale is exactly what is taxed.** That and nothing else. If there is no sale there is no tax. If there is a sale the tax accrues though nothing is collected and no profits arise. The amount of the tax fluctuates with the volume of the sales, and a part of each dollar of the purchase price is taken by the tax. If it be true, and this

court has often so decided, that interstate commerce is present until a sale by the importing owner of the unbroken package is accomplished, and that the portion of the gross price which the owner is entitled to retain is reduced by the tax law, which cannot be gainsaid, it necessarily follows that the tax is a direct burden on interstate commerce and consequently is unconstitutional.

This gross receipts tax cannot be sustained by analogy to ad valorem taxes, inspection fees sufficient only to cover the costs of inspection applied to merchandise requiring inspection, gross profits taxes, those gross receipts taxes which are only a method of reaching the value of property within the taxing state, a tax levied by the state of its creation on a corporation engaged in interstate commerce, or a fixed tax on the occupation of a peddler who brings his merchandise from another state, because those taxes proceed on other theories, have different bases and dissimilar effects to the tax challenged here.

The Texas gross receipts tax is not a tax in lieu of other taxes, but in addition to other taxes. Article 7390, in the chapter with article 7377, reads:

> "Except as herein stated, all taxes levied by this chapter shall be in addition to all other taxes now levied by law; provided that nothing herein shall be construed as authorizing any county or city to levy an occupation tax on the occupations and business taxed by this chapter."

Nor can the Texas gross receipts tax law of 1907 be sustained on the theory that it is an attempt to reach the property as of a going concern. This suggestion is negatived by the language of the supreme court of Texas

in passing on the gross receipts act of 1905, when that court, referring to the terminal railroad company, said:

> "It had paid all ad valorem taxes assessed against its property for the period for which it was sought to recover the tax on its gross receipts, and its franchise taxes in addition. The assessment of its property for ad valorem taxation under the general laws included the value which it has as property of a going concern." (H. B. & T. Ry. Co. vs. Texas, 108 Texas, l. c. 319-320.)

The suggestion is also opposed to the holding of this court in Meyer vs. Wells Fargo & Co., 223 U. S., 299, where it is said:

> "Even if we read the words which follow without a comma, viz., 'upon the property and assets of such corporation,' as not qualifying those which immediately precede, but as attempting to characterize the 'gross revenue tax' as a tax on such property and assets, nevertheless all the property and assets are the subject of the ad valorem taxes referred to. Therefore this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of Maine vs. Grand Trunk R. Co., 142 U. S., 217, given in Galveston, H. & S. A. R. Co. vs. Texas, 210 U. S., 217, 226; Flint vs. Stone Tracy Co., 220 U. S., 107, 162-165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items."

The distinction between a gross receipts tax which is in addition **to all other taxes** levied by law, and one that is **in lieu of all other taxes,** is clearly pointed out in the

decision of this court in United States Express Co. vs. Minnesota, 223 U. S., l. c. 346, where this court said:

> "The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham in McHenry vs. Alford, 168 U. S., 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, while it was not necessary to the decision of the case, is nevertheless apposite 'When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

Appellants paid ad valorem state, county and city taxes on their property each year. (Record 34-35.)

The tax which appellants are contesting cannot be distinguished in principle from the tax levied by the same system of taxation on gross receipts, collected in Texas by a Texas railroad, arising in part from interstate transactions, which was annulled in G. H. & S. A. Ry. Co. vs. Texas, 210 U. S., 217, and in H. B. & T. Ry. Co. vs. Texas, 108 Texas, 315. The vice which vitiated the railroad section also destroys section 9 of the act.

This case comes within the principle of Crew Levick Co. vs. Penn., 245 U. S., 292. In delivering the opinion, Mr. Justice Pitney said:

> "We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale venders doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent."

He then listed the authorities on which he based his statement and said:

> **"Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned."**

After reviewing other cases in this court, the justice proceeded:

> "The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; for, as was said in State Freight Tax Case, 15 Wall.

232, 277: 'The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state.' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it.''

We believe no line can be drawn that will leave Crew Levick Co. vs. Penn., H. B. & T. Ry. Co. vs. Texas, and G. H. & S. A. Ry. Co. vs. Texas on one side, and this case on the other.

3. The attorney general and comptroller, who are clothed with duties with respect to the enforcement of the gross receipts tax law of the state, and who were threatening and about to commence proceedings to enforce against the appellants the unconstitutional gross receipts tax, should have been enjoined from doing so, because the admitted facts under the decisions of this court make a case reasonably free from doubt; the suspension of appellants' right to do business would necessarily work great and irreparable injury to them; and no consent has been given to sue the state for taxes paid under protest, or for penalties wrongfully exacted.

Green v. L. & I. R. R. Co., 244 U. S. 506; Western Union Telegraph Co. v. Andrews, 216 U. S. 166; Philadelphia Co. v. Stimson, 223 U. S. 621; Raymond v. Chicago Union Traction Co., 207 U. S. 38; Ex Parte Young, 209 U. S. 123, 155, 156; Reagan v. Farmers Loan & Trust Co., 154 U. S. 390; Cavanaugh v. Looney, Attorney General, 248 U. S. 456.

The comptroller sent his final notice to appellants May 23, 1919. (R. 39.) In this notice he threatened

the penalty and the forfeiture of the permit to do business, unless the return was made and the tax was paid within thirty days. (R. 39.)

On April 1, 1919, appellants' attorneys addressed a letter to the state revenue agent (whose duties about that time were taken over by the comptroller), calling attention to the notice which appellants had received, advising that a large part of their gross receipts were from interstate business, and asking the construction of the collecting officer as to the applicability of the tax. (R. 40.) This letter elicited from the comptroller the reply that appellants were required to pay a two per cent tax at the end of each quarter **"upon any and all sales made within this state"**. (R. 41.)

The statutes then and now existing to enforce the payment of the tax are these:

> Revised civil statutes of Texas, "article 7386. Penalty for failure to report.—Any person, company, corporation or association, or any receiver or receivers, failing to make report for thirty days from the date when said report is required by this chapter to be made, shall forfeit and pay to the state of Texas a penalty of not exceeding one thousand dollars. (Id. sec. 18.)
>
> Art. 7387. Penalty for failure to pay tax.—Any person, company, corporation or association, or any receiver or receivers, failing to pay any tax for thirty days from the date when said tax is required by this chapter to be paid, shall forfeit and pay to the state of Texas a penalty of ten per cent upon the amount of such tax. (Id. sec. 19.)
>
> Art. 7388. Penalties to be recovered by attorney general.—The penalties provided for by this chapter shall be recovered by the attorney general in a suit brought by him in the name of the state of Texas;

Art. 7385. Tax to be paid when business is begun after beginning of quarter.--If any individual, company, corporation, firm or association, in this chapter mentioned, shall begin and engage in any business for which there is an occupation tax herein imposed, on or after the beginning day of the quarter for which said tax is imposed, then, and in all such cases, the amount of such tax for said beginning quarter shall be and is hereby fixed at the sum of fifty dollars, payable to the treasurer of the state of Texas in advance, but for the next succeeding quarter, and all other succeeding quarters, the tax shall be determined by reports to the comptroller of public accounts of the business for the preceding quarter, or part thereof, as herein otherwise in this chapter provided; and reports and payments of such tax shall be made subject to all other provisions of this chapter. (Id. sec. 17.)

and venue and jurisdiction of such suit is hereby conferred upon the courts of Travis county, Texas. (Id. sec. 20.)

Art. 7389. Permit not granted until tax is paid.—No individual, company, corporation or association, failing to pay all taxes imposed by this chapter, shall receive a permit to do business in this state, or continue to do business in the state, until the tax hereby imposed is paid. The receipt of the treasurer of the state of Texas shall be evidence of the payment of such tax. (Id. sec. 21.)

Art. 7391. Comptroller may require additional reports.—If for any reason the comptroller of public accounts is not satisfied with any report from any such person, company, corporation, copartnership or association, he may require additional or supplemental reports containing information and data upon such matters as he may need or deem necessary to ascertain the true and correct amount of all taxes due by any such person, firm or corporation. Every statement or report required by this chapter shall have affixed thereto the affidavit of the president, vice-president, secretary or treasurer of the person, corporation, copartnership or association, or one of the persons or members of the partnership making the same, to the effect that the statement is true. The comptroller shall prepare blanks to be used in making the reports required by this chapter. (Id. sec. 23.)

Art. 7392a. Persons, etc., subject to gross receipts tax required to have permit to transact business; issue of permit.—Every person, company, firm, partnership, corporation, or unincorporated company or association, engaged in any business within this state, upon which the laws of this state require the payment of a tax on gross receipts, shall after this act becomes effective be required to have a permit to transact such business, to be issued by the secretary of state, which permit shall be and remain posted,

subject to the view of the public at the principal office of such person or concern to whom the same is issued. The permit shall be issued in such form as may be prescribed by the attorney general, shall show the name of the person or concern to whom issued, the business to be transacted, and that the holder thereof has complied with this act. (Acts 1918, 4th C. S., ch. 84, sec. 1.)

Art. 7392b. Permits to transact business; issue; duration of.—Permits to transact business shall be issued by the secretary of state upon applications made upon forms prescribed by the secretary of state, which applications shall show, to the satisfaction of the secretary of state, the facts required to be shown in the permit; and shall show that the applicant has paid the gross receipts taxes prescribed by law, or that if the applicant is the vendee of a going business that his vendor has paid all his gross receipts taxes due, or to become due; such taxes are to be shown to be paid for the current quarter, or such other period of time as said taxes may be paid. The secretary of state shall make such investigation as necessary to determine that such taxes have been paid and shall then issue a permit to transact business, authorizing the party to whom issued to transact business until the 31st day of December of the current year, after which date new permits for each year must be obtained, as in the first instance; provided, however, that those now engaged in business shall have sixty days after this act becomes effective to obtain permits hereunder, but all those beginning business after this act becomes effective must obtain a permit before transacting business. When a permit has been issued as herein provided, it shall be the duty of the secretary of state to immediately certify such fact to the comptroller of public accounts. (Id. sec. 2.)

Art. 7392c. Suspension of permit on non-payment of tax.—Within thirty days after gross receipts taxes may become due by anyone transacting, or authorized to transact, business hereunder, if such tax remains unpaid, the comptroller shall certify such fact to the secretary of state, whose duty it shall be to notify the delinquent tax payers that his name has been certified to the secretary of state as a delinquent and that unless the tax is paid to the comptroller within ten days from the date of such notice the permit to transact business of the delinquent will be suspended by the secretary of state. The notice herein provided for shall be given by the secretary of state, mailing to the delinquent at his last known address a printed or written notice, and the mailing of such notice by the secretary of state shall be a sufficient compliance of this act. If the tax, with accrued penalties, is not paid within fifteen days after the mailing of the notice the secretary of state shall note on his records that the permit to transact business of the delinquent has been suspended, giving the date upon which such action was taken by the secretary of state. The secretary of state shall then immediately certify such suspension to the comptroller and to the attorney general. After the permit to transact business has been suspended it shall be unlawful for the delinquent to continue to transact business, and it shall be the duty of the secretary of state to cause to be published in some daily or weekly paper, published in the county of the delinquent's place of business, or if there is no newspaper published in such county, then in some daily newspaper of statewide circulation, notice that the delinquent's permit to transact business has been suspended. (Id. sec. 3.)"

Penal Code of Texas, Art. 1488.—"Powers and duties of state revenue agent.—The governor is authorized to appoint a suitable person as revenue agent for the state, for the purpose of securing a better en-

forcement of the revenue laws of the state. The agent provided for herein shall be known as the state revenue agent. Said revenue agent shall be subject to the directions of the governor, who may, whenever in his judgment the public service demands it, direct the said revenue agent to investigate books and accounts of the assessing and collecting officers of this state, and all officers and persons disbursing, receiving or having in their possession public funds, and to make such other investigations and perform such other duties in the interest of the public revenues as the governor may direct. Whenever any such investigation is ordered by the governor, the revenue agent shall report to him in writing the results of such investigation, and point out the particulars, if any, wherein the revenue laws have been violated, their enforcement neglected, together with the names of the parties delinquent therein. Whereupon the governor shall institute civil and criminal proceedings through the attorney general in the name of the state against such delinquent parties who are reported by such agent to be delinquent. Said revenue agent shall have power at any time to examine and check up all and any disbursements or expenditures of money appropriated for any of the state institutions or for any other purpose or for any improvements made by the state on state property or money received and disbursed by any board authorized by law to receive and disburse any state money. Said revenue agent shall also have power and authority, and it is hereby made his duty, to fully investigate any and all state institutions when so directed by the governor or required by information coming to the knowledge of said agent. He shall investigate the manner of conducting the same and the policy pursued by those in charge thereof, and the conduct or efficiency of any person employed therein by the state. He shall examine into and report upon the character and manner as well as the amount of ex-

penditures thereof. He shall also investigate and ascertain all sums of money due the state from any source whatever; the ascertainment and collection of which does not devolve upon other officers of this state under existing law. And he shall report all such facts to the governor, who shall proceed therein as provided by this or any other law of this state. (Acts 1891, p. 87; amended Acts 1899, p. 26.)

The office of the state revenue agent was abolished after January 15, 1919, by act 1918, 4th c. s., ch. 94, sec. 1, and articles 7074, 7366, 7367, 7368, and 7392 of the revised civil statutes were repealed. Section 4 of said act 1918, 4th c. s., ch. 94, devolves the duties and functions of the state revenue agent upon the conmptroller of public accounts.

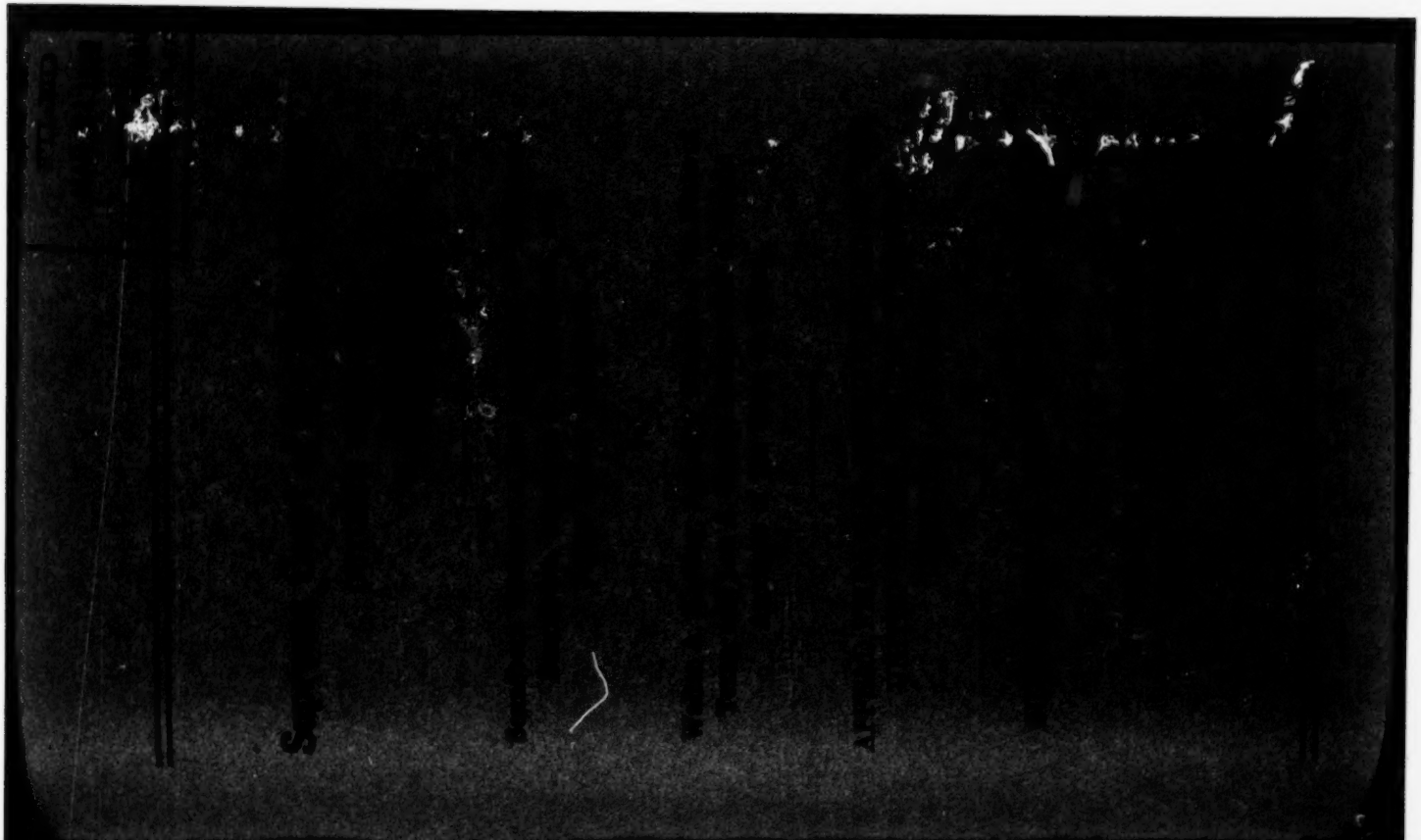
Art. 1489. (990) Books and records of officers to be submitted; penalty.—When said revenue agent, acting under the direction of the governor, calls on any person connected with the public service to inspect his accounts, records or books, said officers or official so called upon shall submit to said agent all books, records and accounts so called for without delay. Any failure or refusal on the part of any officer or official to comply with the provisions of this article shall be an offense, for which, on conviction thereof, he shall be fined not less than one hundred nor more than one thousand dollars, and may be imprisoned in the county jail not more than one year. (Act April 13, 1891, p. 87, sec. 2.)

Art. 1490. (991) Penalty for making false report.—Said revenue agent shall receive as compensation for his services not exceeding two thousand dollars per annum, together with his actual traveling expenses, which shall be paid on the approval of the same by the governor; provided, that said revenue agent shall not be allowed traveling expenses for any service connected with the examination and investi-

gation of the accounts of any institution in Travis county. If the revenue agent herein provided for shall wilfully make a false or fraudulent report of the financial condition of the books of any officer or official, department or institution, handling, receiving or disbursing any state funds, appropriated or unappropriated he shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, and imprisoned in the county jail for any period not to exceed twelve months. (Id. sec. 3.)"

Respectfully submitted,

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Sonneborn Brothers, Appellants.



Supreme Court of the United States

OCTOBER TERM, 1921

No. 192

Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund B. Sonneborn, and Julius Roten, Appellants.

vs.

Walter A. Keeling, Attorney General of the State of Texas, and Lon A. Smith, Comptroller of Public Accounts of the State of Texas.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Since appellants' brief was filed several decisions have appeared which we think bear on the question presented by the record.

In Askern v. Continental Oil Co., 252 U. S. 444, the court considered "a tax upon the privilege of dealing

in gasoline in the state of New Mexico". The following excerpt from the opinion discloses the pertinent view of the court:

> "Plaintiffs are engaged in the business of buying and selling gasolene and other petroleum products. The bills state that they purchase gasolene in the states of Colorado, California, Oklahoma, Texas, and Kansas, and ship it into the state of New Mexico, there to be sold and delivered. The bills describe two classes of business: first, that they purchase in the states mentioned, or in some one of said states, gasolene, and ship it in tank cars from the state in which purchased into the state of New Mexico, and there, according to their custom and the ordinary method in the conduct of their business, sell in tank cars the whole of the contents thereof to a single customer, before the package or packages in which the gasolene was shipped have been broken. In the usual and regular course of their business they purchase gasolene in one of the states, other than the state of New Mexico, and ship it, so purchased, from that state, in barrels and packages containing not less than two 5-gallon cans, into the state of New Mexico, and there, in the usual and ordinary course of their business, without breaking the barrels and packages containing the cans, it is their custom to sell the gasolene in the original packages and barrels. The gasolene is sold and delivered to the customers in precisely the same form and condition as when received in the state of New Mexico; that this manner of sale makes the plaintiffs distributors of gasolene as the term is defined in the statute, and they are required to pay the sum of $50 per annum for each of their stations as an annual license tax for purchasing, shipping, and selling gasolene as aforesaid.

A second method of dealing in gasolene is described in the bills: That the gasolene shipped to the plaintiffs from the other states, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell such gasolene from such tank cars, barrels, and packages in such quantities as the purchaser requires.

As to the gasolene brought into the state in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in the Standard Oil Co. v. Graves, 249 U. S. 389, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another state into his own state, for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasolene brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state." Askern v. Continental Oil Co., 252 U. S. l. c. 243.

The rule we contend for here was decided in the language quoted. The tax we challenge is one upon the privilege of selling petroleum products in the state levying the tax. The appellees think the act should be applied to sales in the original packages containing the

commodity when brought into the state, justifying their construction only because an interval occurred between the arrival and the sale in the original packages. This court has not held, and should not hold, that one bringing merchandise from another state for sale, is subject to a fluctuating privilege tax, a percentage of the price obtained, for selling it in the original package, though an interval elapse between arrival and sale, during which the property is warehoused subject to state ad valorem taxation, including going value.

Dahnke-Walker Milling Co., v. Bondurant, decided by the court on Dec. 12, 1921, denies the state the right to burden interstate commerce through a permit requirement. The opinion states the nature of interstate commerce in the following excerpt:

> "Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446, 447; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. American Express Company v. Iowa, 196 U. S. 133, 143. This has been recognized in many decisions construing the commerce clause. Thus it was said in Welton v. Missouri, 91

U. S. 275, 280, 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In Kidd v. Pearson, 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In United States v. E. C. Knight Co., 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce'. And in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities'. In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last.

A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. Crutcher v. Kentucky, 141 U. S. 47, 57; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, International Text Book Co. v. Pigg, 217 U. S. 91, 112; Sioux Remedy Co. v. Cope, 235 U. S. 197."

On December 12, 1921, the court also decided Eureka Pipe Line Co. v. Walter Hallanan, Tax Commissioner, et al, and considered the nature of interstate commerce and the extent to which it can be affected by state taxation, saying:

> "As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax, to be valid, 'must not, in its practical effect and operation, burden interstate commerce.' It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived."

This case is also valuable as emphasizing the right to relief where a statute which may be properly applied to intrastate commerce is being applied to interstate commerce under the guise of intrastate commerce. The court said:

> "A case would not be withdrawn from the jurisdiction of this court in error by a declaration that a statute was addressed only to intrastate commerce if it was applied wholesale to freight passing across the continent. The fact that the error was less does not affect the principle involved. But, furthermore, the court only confined the statute to intrastate commerce 'as above defined'; that is, to commerce that embraced what the plaintiff carried on."

On December 12, 1921, the court decided United Fuel Gas Co. v. Walter S. Hallanan, which arose under the same legislation of the state of West Virginia as did the next preceding case, which had been heard with it in the

court *a quo*, and again held the West Virginia law invalid as to an interstate commerce transaction, which the supreme court of West Virginia thought was intrastate business. So far as we know these cases originating in Kentucky and West Virginia have not been officially reported. However, they are found in U. S. Supreme Court Advance Opinions No. 5, January 16, 1922.

In Shaffer v. Carter, 252, U. S. 36, 57, a distinction is made between state taxation affecting interstate commerce, which is not imposed upon the gross receipts therefor, and a tax so imposed. The court refers to Crew Levick Co. v. Pennsylvania, 245, 292, where the tax, as here, was one on gross receipts, and contrasts it with one levied on the net proceeds of a business consisting partly of interstate commerce. That a net income tax, though it include net proceeds from interstate business, differs vitally from a gross receipts tax on interstate commerce is also shown by the decision in Gillespie v. Oklahoma, decided January 30th last and reported in U. S. Supreme Court Advance Opinions, No. 8, March 1, 1922, pages 211 and 212. While it is true the tax then considered was on instrumentalities of the United States, where the prohibition "is absolute in form and stricter in substance" than the rule as to interstate commerce, it is also true, paraphrasing a sentence in the opinion, that a tax upon the gross receipts from merchandise sold in interstate commerce is a tax upon the power to make them, and could be used to destroy the power to make them.

It reasonably appears from these decisions, and other decisions of this court, that while net income derived from interstate commerce is taxable, gross income derived from instrumentalities is not subject to state taxation, and that the gross proceeds of the sale of commodities in interstate commerce enjoys like protection from the imposition of a license tax fluctuating with their volume for the privilege of making the sale.

Respectfully submitted,

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Sonneborn Bros.

No. 20

Supreme Court of the United States

OCTOBER TERM, 1922.

Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund B. Sonneborn, and Julius Roten, Appellants,

vs.

Walter A. Keeling, Attorney General of the state of Texas, and **Lon A. Smith,** Comptroller of Public Accounts of the state of Texas.

Appeal from the district court of the United States for the western district of Texas.

Second Supplemental Brief for Appellants.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellants.

LIST OF CASES.

No. 20

Supreme Court of the United States

OCTOBER TERM, 1922.

Sonneborn Brothers, a firm composed of Ferdinand Sonneborn, Sigmund B. Sonneborn, and Julius Roten, Appellants,

vs.

Walter A. Keeling, Attorney General of the state of Texas, and **Lon A. Smith,** Comptroller of Public Accounts of the state of Texas.

Appeal from the district court of the United States for the western district of Texas.

Second Supplemental Brief for Appellants.

I.

May it please the court:

The cases we think establish these pertinent propositions:

(a) When goods are transported from one state to another for purposes of sale, the commerce does not end with the transportation, but includes the sale of the wares

by the importer after reaching destination, while in the original package.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S.;
Brown v. Maryland, 12 Wheaton, 219, 446, 447;
American Steel & Wire Co. v. Speed, 192 U. S. 500, 519.

(b) An undiscriminating, fixed or unfluctuating tax on the occupation of those selling in original packages articles of interstate commerce affects the commerce only indirectly, and is not a regulation of it.

Woodruff v. Parham, 8 Wall. 123;
Wagner v. Covington, 251 U. S. 95;
Texas Co. v. Brown, 257 U. S.;
American Steel and Wire Co. v. Speed, 192 U. S. 500, 521.

(c) State exaction of a reasonable, fixed inspection fee in respect of articles requiring inspection, while they are in interstate commerce, does not regulate the commerce.

Pure Oil Co. v. Minn, 248 U. S. 158, 162;
Texas Co. v. Brown, 257 U. S.:
D. E. Foote & Co. v. Stanley, 232 U. S. 494.

(d) Taxation for revenue under the guise of an inspection fee, while the commodity is in interstate commerce, regulates the commerce.

Standard Oil Co. v. Graves, 249 U. S. 389;
D. E. Foote & Co. v. Stanley, 232 U. S. 494;
Bowman v. Continental Oil Co., 256 U. S. 649.

(e) A tax measured by the receipts from interstate commerce, which necessarily varies in proportion to the volume of that commerce, is a regulation of it.

State Freight Tax Case, 15 Wall. 232, 277;
Crew Levick Co. v. Penna., 245 U. S. 292;
Galveston, Harrisburg and San Antonio Ry. v. Tex., 210 U. S. 217.

(f) A tax **upon the sale** of commodities is not a property tax. It is an excise which cannot be exacted from sales in interstate commerce.

Bowman v. Continental Oil Co., 256 U. S. 642, 646, 649.

(g) Absence of discrimination does not save a tax otherwise regulatory of interstate commerce.

State Freight Tax Case, 15 Wall, 232, 277;
Galveston, Harrisburg & San Antonio Ry. Co. of Texas,, 210 U. S. 217.

(h) Breaking the original package for sale or consumption removes the object from interstate commerce and subjects it to the full taxing power of the state, exerted without discrimination.

Texas Co. v. Brown, 257 U. S.

II.

The validity of the tax depends on two considerations: is it regulatory in character, and are the sales interstate commerce?

If it be established that the act of selling in the original package an article brought by its owner from another state into the taxing state is a part of interstate commerce, the inquiry resolves into whether such a tax regulates such commerce. And if the tax is regulatory, it neces-

sarily regulates interstate commerce because commerce cannot be interstate and intrastate. The terms are mutually exclusive.

Three kinds of commerce are treated in the tax decisions of this court, foreign, interstate and domestic. Foreign commerce is protected by the constitution of the United States against every state levy other than a reasonable inspection fee. Interstate commerce is only protected against a tax which regulates it; and intrastate commerce is subject to the full power of state taxation, so long as there is no discrimination based on extrastate origin.

Cleavage from foreign or interstate commerce into domestic commerce takes place at that moment when either the first sale is made by the importing owner or the package of importation is broken up for sale or use in domestic commerce. The test of a state tax which affects the commerce before the conclusion of this sale or breaking the package is whether it regulates interstate commerce.

Certain classes of taxes, including fixed occupation taxes and property taxes, have been regarded by this court as only indirectly affecting interstate commerce, and therefore constituting no regulation thereof.

In some cases where a fixed property or occupation tax was in issue the tax was upheld as lacking the element of regulation because the property, though it retained the character of interstate commerce, had come to rest within the taxing state in the original package before

sale by the importer. The tax under challenge, however, is neither a fixed occupation tax nor a property tax, but is an excise tax levied on the **act of sale**, fluctuating with the amount that is, or may be, realized from **the sale**, and taking for the use of the state for the **right to sell** a percentage of the price.

Enforcement of the tax is supported by the provision for withdrawal of appellant's permit to do business. The permit requirement of the law is the equivalent of an excess inspection fee in prohibiting sale of the original package. Payment in advance of sale is not required but payment of the percentage of gross receipts from prior sales is a condition precedent to the future selling of original packages. The prohibition is as complete and of the same nature as the ones stricken in Leisy v. Hardin and Lyng v. Michigan. Sale without a permit by the importing owner of the original unbroken package is a criminal offense.

Whenever such a tax, on the gross proceeds realized from an act of interstate commerce, has come before this court, it has been condemned as a regulation of interstate commerce and as the exercise of a power granted by the states to the federal government. Few of the cases only need be referred to.

State Freight Tax Case, 15 Wall. 232, 277. The court speaking of the tax said:

> "If, then, this is a tax upon freight carried between states, **and a tax because of its transportation**, and if such a tax is, in effect, a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the constitution of the United States."

The tax there was held to be on transportation, one of the constituents of interstate commerce.

In the instant case the tax is on **the sale by the owner in the original package,** another constituent of interstate commerce. The Pennsylvania tax was levied on each article transported. The Texas tax is laid on each article sold and has the additional vice that it fluctuates with the price, unlike the Pennsylvania exaction which was fixed for each article transported.

In practical effect fixed property and occupation taxes reaching the original package held intact at destination by the importing owner for sale, may be assimilated to taxes on roadbed and cars used in interstate commerce, situated in the taxing state. Without them commerce cannot be conducted, but they are not of the essence thereof, only incidental thereto. Likewise the **imported article** is not itself commerce but something on which commerce operates. The commerce involved is buying, transporting and selling. It seems logically to follow that if a fluctuating excise on the gross proceeds of operation is invalid, a tax of the same character on the gross proceeds of sale would fall for the same reason.

Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 341. The court said:

> "The tax in the present case is laid upon the **gross receipts for transportation as such.** Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same

thing,) for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but **because they were received for transportation.** No doubt a ship owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, **no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year,** it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it."

Everything that was said by the court in this case is equally applicable to the Texas statute, viewed as a gross receipts tax laid on the proceeds arising from the act of sale, just as important a constituent in interstate commerce as transportation is. Indeed, transportation is only incidental to the sale which consummates the transaction, consisting of the three constituent elements of purchase beyond the state, transportation into it, and sale there in the original unbroken package by the importing owner.

Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227. The court, speaking of another section of the act containing the section challenged, said:

> "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states."

Crew Levick Co. v. Penn., 245 U. S. 292, 295. The court said:

> "No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale venders doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and for the same reason, to be in effect an impost or duty upon exports."

III.

Appellees contend that delivery of the original package to the consignee at destination before he had sold it, withdrew the oil from interstate commerce as completely as if the original package had been broken or delivered to another than the importing owner at the termination of the transportation for the purpose of sale or use by him. We insist the decisions of this court condemn state taxation of a regulatory nature, while the article is still owned by the importer and in the original unbroken package of importation. Undoubtedly this is true where the police power is exerted over the original

package, (Leisy v. Hardin, 135 U. S. 100, 124; Lyng v. Mich., 135 U. S. 161, 166), and we think it equally true as regards the taxing power when the tax is regulatory in character. Only through a sale by the owning importer would the original package "become mingled in the common mass of property within the state." The power to purchase with a view to interstate transportation is protected from permit taxation under the commerce clause while the article is at rest in the state of origin because this constitutes a regulation, and we urge that the same principle extends the protection against taxation, regulatory in its nature, of a sale of the article in the original package as contemplated by the importer even though no purchaser has been secured before the transportation service ceases.

In Dahnke-Walker Milling Co. v. Bondurant, supra, a contract was made in the state of Kentucky for the purchase of a crop of wheat ultimately destined for transportation into Tennessee. The conclusion that this contract was within the protection of the federal instrument was based on holdings in cases extending the protection after transportation services ceased, while the original package was held by the importer at destination. It is a principle common to both that protects the contract of purchase made at Hickman, Kentucky, for wheat to be transported, before the transportation began, and the contract of sale of oil sold in Texas by the importer after

delivery to him there. The principle of the case is clearly stated in the following language:

> "Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages."

The facts in this case show that Sonneborn Brothers have been engaged for many years in bringing into Texas oils in original packages and selling them there in such packages. These facts characterized the sales taxed. The sales were made pursuant to a course of business long established, and when this course of business is looked to their connection with interstate commerce is so clear and intimate that what might appear to be a Texas sale if they were not looked to, is shown by them to be a sale in interstate commerce. This consideration gave complexion to the Kentucky purchase of wheat for shipment. Warehousing by the owner is as incidental to buying and selling the unbroken package of importation as was transportation of the wheat. The essence of the transaction is buying and selling to realize a profit if possible and all else is incidental to the desired end.

The expressions in Texas Co. v. Brown in reference to the taxing power of the state over domestic commerce are explained by the facts of that record. The oil brought by Texas Co. into Georgia "entered the state in tank cars of about eight thousand gallons each." Texas Co. v. Brown, 266 Federal, 577, 578; Texas Co. v. Brown, Advance Opinions, June 1st, 1922, 428, 430.

There was no storage of the original package of importation, which was the tank car. The only storage accrued from breaking the original package by draining the oil therefrom into wagons or into storage tanks maintained at the respective stations of Texas Co. in Georgia, to be taken therefrom by Texas Co. for use as fuel in developing power in its wagons, or as sold from the storage tanks to other persons.

All that is said in this opinion about the right of the state to tax domestic sales and property stored must be taken as referring to the sales under investigation there and to such storage as that record disclosed. The domestic sales spoken of were sales after the original package had been broken; the indefinite storage spoken of was not a storage of the unbroken package of importation, but a storage of the contents after the oil had been withdrawn from the original package.

It is no part of our argument that after the package is so broken as occurred in the Texas Co. case, and the contents stored and sold as the record disclosed in that case, the state did not possess full power to levy an undiscriminating tax on the property and sales. But we think the cases will support us in the contention that a mere warehousing by the owner of an unbroken original package at the point of destination, which is reasonably necessary and incidental to a sale of the package in its existing form, does not bring the act of sale into the class of domsetic sales and thus subject its exercise to a fluctuating gross receipts tax on the proceeds of the sale.

It does not answer our contention that under the authorities of Woodruff v. Parham, 8 Wall, 123; American Steel & Wire Co. v. Speed, 192 U. S. 522, and Wagner v. Covington, 251 U. S. 95, the state may levy a fixed tax on the business of selling, amongst other things, unbroken packages shipped into the state, or fixed peddlers' occupation tax, or a property tax levied against such packages before sale, because such taxes have not that direct regulatory effect on the sale which ensues from the exaction of a percentage of the realization therefrom.

This court has said:

> "The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws." Gillespie v. Oklahoma, U. S. Supreme Court Advance Opinion, March 1st, 1922, 211, 212.

IV.

Regarding these different classes of taxes in respect to their reaction on interstate commerce, the gross receipts tax under challenge is of the prohibited degree, though the property and occupation taxes are of a lesser and permissible degree.

Respectfully submitted,

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Sonneborn Brothers, Appellants.

SUBJECT INDEX.

TABLE OF CASES.

A82-421-60

No. 665.

In the Supreme Court of the United States,

OCTOBER TERM, 1920.

SONNEBORN BROTHERS, A FIRM COMPOSED OF FERDINAND SONNEBORN, SIGMUND B. SONNEBORN, AND JULIUS ROTEN, APPELLANTS,

vs.

C. M. CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND MARK L. WIGINTON, COMPTROLLER OF THE STATE OF TEXAS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This suit was brought by Sonneborn Brothers, a partnership composed of citizens of the States of Maryland and New York, asking for an injunction against the Attorney General and the Comptroller of the State of Texas to restrain them from attempting to collect from plaintiffs the occupation tax which wholesale dealers in oils are required to pay by the provisions of Article 7377, Revised Civil Statutes of Texas, and from attempting to collect the penalties provided by Articles 7386 et seq., Revised Civil Statutes of Texas, for failing to make the report and to pay the tax prescribed by said Article 7377, it being the contention of plaintiffs that said Article 7377 is unconstitutional in that it is in conflict with, and contrary to, Section 8, Article 1, of the Constitution of the United States and the first section of

the Fourteenth Amendment to the Constitution of the United States. On February 28, 1920, this case came on for trial at New Orleans, Louisiana, on appellants' motion or prayer for temporary injunction before a court constituted as provided for by Section 266 of the Judicial Code. The court, after hearing the evidence and argument of counsel, took the case under advisement and later announced its decision, which denied to plaintiffs the relief prayed for. (R. 17.)

Afterwards, appellants amended their bill and omitted all contentions contained in their original bill, save and except that the State of Texas is prohibited by Section 8, Article 1, of the United States Constitution and the first paragraph of the Fourteenth Amendment thereof from collecting from appellants the tax levied by Article 7377, Revised Statutes of Texas, on goods brought into the State of Texas by appellants and placed in their warehouses located at Dallas or San Antonio, Texas, and afterwards sold by the agents or salesmen of appellants, and delivered from the warehouses to the purchaser in the original unbroken package. (R. 26.) On final hearing the court refused the injunction and dismissed appellants' bill. (R. 54-55.)

Argument.

1. ARTICLE 7377, REVISED CIVIL STATUTES OF TEXAS, 1911, DOES NOT AMOUNT TO AN ATTEMPT ON THE PART OF THE STATE OF TEXAS TO REGULATE COMMERCE AMONG THE STATES.

Since January 1, 1910, appellants have received $217,179.10 from the sale of goods in the State of Texas brought "from other States into Texas *before they were sold, which goods were afterwards sold by Sonneborn Brothers in Texas*" in the original unbroken packages that the goods were in when brought to Texas. (R. 53.) The tax due the State of Texas from these sales is $4343.58, if Article 7377, Revised Civil Statutes of Texas, is valid. (R. 53.)

Galveston, Harrisburg & San Antonio Railway Company vs. Texas, 210 *U. S.*, 217.

Appellants direct the attention of the court to the Texas Gross Receipts Tax Law of 1905, and to the decision of this court in the above case, which declared the law of 1905 invalid as applying to gross receipts of railroads.

In this case, the court said that the Act of 1905 "is entitled 'An Act imposing a tax upon railroad corporations * * * and other persons * * * owning * * * or controlling any line of railroad in this State * * * equal to 1 per cent of their gross receipts * * * and repealing the existing tax on the gross passenger earnings of railroads.' It proceeds in paragraph 1 to impose upon such railroads 'an annual tax for the year 1905, and for each calendar year thereafter, equal to 1 per centum of its gross receipts, if such line of railroad lies wholly within the State.' In paragraph 2 a report, under oath, of 'the gross receipts of such line of railroad, from every source whatever, for the year ending on the 30th day of June last preceding,' and immediate payment of the tax 'calculated on the gross receipts so reported' are required. The Comptroller is given power to call for other reports, and is to 'estimate such tax on the true gross receipts thereby disclosed,' etc. The lines of the railroads concerned are wholly within the State, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points within the State." (Exact page 224.)

After thus stating the facts, it was said:

> "*We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States.* The distinction between a tax 'equal to' 1 per cent of gross receipts and a tax of 1 per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer

> from the judgment of the State court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'
>
> "Of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State. We are of opinion that the judgment should be reversed." (This quotation begins with the last paragraph on page 227 and ends on page 228.) [Italics ours.]

Mr. Justice Harlan wrote a dissenting opinion, with whom concurred Mr. Chief Justice Fuller, the present chief justice, and Mr. Justice McKenna. In the last paragraph of the dissenting opinion, it is said:

> "If it did not delay an announcement of the court's decision longer, perhaps, than is desirable, I should be glad to go into this subject at large and present such a review of the adjudged cases as would show that the views expressed by me are in harmony with previous cases in this court. The present decision, I fear, will seriously affect the taxing laws of many States, and so impair the powers of the several States, in matters of taxation, that they cannot compel its own corporations to bear their just proportion of such public burdens as can be met only by taxation. I dissent from the opinion and judgment of the court." (Exact page 230.)

Houston Belt and Terminal Railway Company vs. Texas, 108 *Texas,* 314.

Appellants also direct the attention of the court to Section 16 of the Act of 1907 (Art. 7384, Revised Civil Statutes of Texas, 1911), which levied an occupation tax on terminal companies and terminal railroads, and which was held invalid by the Supreme Court of Texas in the above case. The Supreme Court of Texas held Section 16 of the Act of 1907 invalid on the authority of the

Galveston, Harrisburg & San Antonio Railway Company vs. Texas, above referred to, and in doing so, said in part:

> "While the nature of the tax levied by the Act of 1905 was thus undefined in terms, this court held it to be an occupation tax; and, relying upon the decision of the United States Supreme Court in Maine vs. Grand Trunk Railway Co., 142 U. S., 217 (12 Sup. Ct., 121, 35 L. Ed., 994)—wherein it was affirmed that a State could lawfully lay an excise tax upon railroad corporations exercising their franchises within its borders, consisting of a stated per centum upon their gross receipts derived in part from interstate commerce,—sustained the act. Maine vs. Grand Trunk Railway Co. is apparently the authority upon which the Court of Civil Appeals rested its decision in the present case.
>
> "The Supreme Court of the United States, however, in its determination of State vs. Galveston, Harrisburg & San Antonio Railway Co., refused to apply the doctrine broadly announced in Maine vs. Grand Trunk Railway Co. It there held that the tax levied by the Act of 1905, whatever its name or form, amounted to a tax upon the interstate business of the corporations subject to it, and declared the act invalid." (108 Texas, 318, 319.)

We are not criticising the majority opinion in Galveston, Harrisburg & San Antonio Railway Co. vs. Texas. What we are attempting to do is to show that the decision of the Supreme Court of Texas relied on by appellants holds invalid an entirely different section of the law than the one now attacked by appellants, and that in holding Section 16 of the law of 1907 invalid, the Supreme Court of Texas was but following the decision of this court in holding that part of the law of 1905 invalid that levied a tax on railroads "equal to 1 per centum of its gross receipts if such line of railroad lies wholly within the State, and if such line of railroad lies partly within and partly without the State it shall pay a tax equal to such proportion of the said 1 per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line," and the decision of this court striking down this law was by a divided court. We

accept the majority opinion, as we must, as being correct, and this court has since followed the majority opinion and it is now accepted as unquestionably being the law.

The law of 1905 was held bad by this court, because, in the opinion of the court, "the statute levying this tax does amount to an attempt to regulate commerce between the States." Does Section 9 of the Act of 1907 amount to an attempt to regulate commerce among the States? If so, it must fall; if not, it will stand.

Article 7377, Revised Civil Statutes of Texas.

Section 9 of the Act of 1907 (Art. 7377) provides that "each and every company, individual, corporation or association * * * which shall engage * * * in this State in the business of wholesale dealers in coal oil, naphtha, benzine or any other mineral oils refined from petroleum, shall make quarterly * * * a report to the Comptroller of Public Accounts * * * showing the gross amount collected and uncollected from any and all sales *made within this State* of any of said articles during the quarter next preceding." The act then levies a tax of 2 per cent of said gross receipts, and amounts uncollected as shown by this report. (This section of the Act of 1907 is set out in full on pages 8 and 9 of appellants' brief.)

This law per se does not attempt to regulate commerce between the States. The tax is on "sales made within the State." Appellees admit that where the articles mentioned in the statute are sold by an agent or drummer, and are later shipped direct to the purchaser from outside the State, that the sale cannot be taxed. Robbins vs. Shelly Taxing District, 124 U. S., 489; Asher vs. Texas, 128 U. S., 129; Brennan vs. Titusville, 153 U. S., 289.

Appellants have made sales within the State of Texas, amounting to $860,801.50. (R. 28.) Of this amount, only $233,728.94 were made after the goods had reached Texas. (R. 29.) This leaves sales to the amount of $627,072.56 made before the goods were shipped to Texas, and which appellants admit the State is

not attempting to tax. (R. 30.) Of the sales made after the goods had reached Texas, appellants claim only $16,549.84 were sold in broken packages. On these sales, they offered to pay taxes to the amount of $330.99, but refused to pay the taxes on the sales amounting to $217,179.10, because the goods were delivered from appellants' warehouses located in Texas to the purchasers also in Texas in the original package that the goods were in when brought by appellants into the State of Texas.

It is evident that the Legislature, in enacting what is now Article 7377 of the Revised Civil Statutes of Texas had in mind the case of Galveston, Harrisburg & San Antonio Railway Co. vs. Texas, supra, and were careful to state against whom and upon what object the tax was levied. It is upon each and every company, individual, corporation or association engaged in this State as wholesale dealers in the articles mentioned, and the tax is on "sales made within the State." In this connection, we cannot do better than to call the court's attention to the language used in the opinion of Judge Smith, who wrote the opinion of the court refusing to grant to appellants a temporary injunction:

> "Now, let us examine the statute in question, and see against whom and upon what object or objects it levies the tax. It is against those who 'engage in this State in the business of wholesale dealers in coal oil,' etc., and the tax is levied upon the gross amount collected and uncollected from any and all 'sales made within this State.' The words quoted are words of limitation, and were evidently intended by the Legislature to restrict the tax to intrastate commerce. By use of the expression 'sales made within the State,' the Legislature no doubt intended to confine the tax to sales begun and completed within the State,—to sales which could not be classed as interstate commerce; else why should these qualifying words have been used? They certainly mean something.
>
> "The courts in a long line of decisions have enunciated the general principle that the presumption is in favor of the constitutionality of a statute. It has been declared that in no doubtful case should the courts pronounce legislation to be contrary to the Constitution. It is elementary that where the validity of a statute is called in question and there are

two possible interpretations by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it. In the case of St. Louis & S. W. Ry. Co. vs. Arkansas, 235 U. S., 350, our Supreme Court said:

"'We ought not to indulge the presumption that the Legislature intended to exceed the limits imposed upon State action by the Federal Constitution, or that the courts of the State will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the Legislature intended to act within the scope of its authority.'

"To the same effect are, Singer Sewing Machine Co. vs. Bricknell, 233 U. S., 313; Ohio Tax Cases, 232 U. S., 591; Chesapeake & Ohio Ry. vs. Kentucky, 179 U. S., 388; Pacific Express Co. vs. Seibert, 142 U. S., 142. And we may add that especially should this be the rule where the constitutional limitations had already been clearly defined by the courts when the legislative act in question was passed, as in the present case." (R. 24.)

Referring to the contentions made by appellants, plaintiffs in the case below, Judge Smith said:

"To sustain their right to an injunction in this case plaintiffs rely mainly upon the decisions in Galveston, Harrisburg & S. A. Ry. vs. Texas, 210 U. S., 217, and H. B. & T. Ry. Co. vs. Texas, 108 Texas, 314. We do not think those decisions are at all inconsistent with the views we have expressed. Those were suits to recover taxes, under State statutes, on the gross receipts from both the intrastate and interstate business of the defendants. The tax on the interstate business was a burden thereon and beyond the power of the State to levy or collect, and as there was no showing or contention that the intrastate business was separable from the interstate business the recovery was properly denied in toto. In those cases the State officers asserted the right to tax interstate commerce; *in this case they disclaim any such right.*" (Italics ours.)

American Steel and Wire Company vs. Speed, 192 *U. S.,* 500.

Appellants rely on the above case. We do not think the opinion in this case will support appellants' contentions. The State of Tennessee levied a general merchandise tax and a merchant's privilege tax, the officers whose duty it was to assess the taxes, assessed against the American Steel and Wire Company both the general merchandise tax and a merchant's privilege tax. The present Chief Justice wrote the opinion of the court, and in stating the facts, said in part:

> "That the company was a New Jersey corporation, having a place of business in the city of Chicago, and owning and operating various plants for the manufacture of wire, nails, etc., in States other than the State of Tennessee. And, for the purpose of facilitating the sale and delivery of the goods by it manufactured, it had selected Memphis, Tennessee, as a distributing point, and had made an arrangement in that city with the Patterson Transfer Company, a corporation engaged at Memphis in the transfer of merchandise. By this arrangement the Patterson Transfer Company was to take charge af the products when shipped to Memphis, consigned to the steel company, store them in a warehouse there, assort them and make delivery to the persons to whom the goods were sold by the steel company. It was averred that the Patterson Transfer Company, in fulfilling its obligations under the contract, was in no sense a merchant, but only a carrier, and that the steel company, in storing and delivering its goods at Memphis, *was not a merchant in Memphis, but was simply a manufacturer, delivering in the original packages goods made in other States to the persons who had bought them.* In substance, besides, it was alleged that the goods in the warehouse in Memphis were merely in transit from the point of manufacture outside of the State of Tennessee to the persons to whom they had been previously sold. The levy of the tax was charged to be repugnant to the commerce clause of the Constitution of the United States: First, *because the goods in the warehouse in Memphis were in the original packages as shipped from other States* and had not been sold in Tennessee, and hence had not been commingled with the property of that State, and because, in any event, they had acquired no

situs in Tennessee, as they were moving in the channels of interstate commerce from the place where the goods were manufactured, for delivery to the persons to whom in effect they had been sold. Second, because, as the State of Tennessee exempted from taxation articles manufactured from the produce of that State, no tax could be imposed by Tennessee upon articles manufactured from the produce of other States, without operating a discrimination against articles manufactured from the produce of other States." (Exact pp. 510-511.)

It will be observed that the steel company averred that it was not a merchant in Memphis, that it was a New Jersey corporation, having a place of business in Chicago, and was *"delivering in the original packages goods made in other States to the persons who had bought them."* That the goods had acquired no situs in Tennessee "as they were moving in the channels of interstate commerce from the place where the goods were manufactured for delivery to the persons to whom, in effect, they had been sold."

In holding the tax valid, the court said, in part:

"Since Brown vs. Maryland, 12 Wheat., 419, it has not been open to question that taxation imposed by the States upon imported goods, whether levied directly on the goods imported or indirectly by burdening the right to dispose of them, is repugnant to that provision of the Constitution providing that 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports.' Article I, Sec. 10, paragraph 3. And Brown vs. Maryland, also settled that where goods were imported they preserved their character, as imports, and were therefore not subject to either direct or indirect State taxation as long as they were unsold in the original packages in which they were imported. A recent case referring to the authorities and restating this elementary doctrine is May vs. New Orleans, 178 U. S., 496. Assuming that the goods concerning which the State taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another State constituted an importation, in the constitutional signification of that word, it is clear they could not be directly

or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to State taxation after they had reached their destination and whilst held in the State for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in Brown vs. Maryland. Woodruff vs. Parham, 8 Wall., 123; Brown vs. Houston, 114 U. S., 622. The doctrine upon which the cases rest was this, that imports, in the constitutional sense, embraces only goods brought from a foreign country, and consequently does not include merchandise shipped from one State to another. The several States, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the States had the power, *after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the State.*

"Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was restated. Emert vs. Missouri, 156 U. S., 296; Kelly vs. Rhoads, 188 U. S., 1. But it is strenuously insisted that the principle of the cases referred to, reiterated again and again and uniformly followed for so long a period of time, has been by inevitable implication overruled by the the cases of Leisy vs. Hardin, 135 U. S., 100; Lyng vs. Michigan, 135 U. S., 161, and other cases resting on the rule expounded in those cases." (Exact pages 519-520.) [Italics ours.]

The Texas law under attack says that persons engaged in the business described in the law shall pay a tax equal to two per centum of the gross amount collected, and uncollected, "from any and all sales made within this State." There is no discrimination

against anyone. The law applies alike to all persons engaged in the business named in the law. Appellants have a great advantage over their competitors who do business only in Texas as it is. The advantage will be still greater if they are permitted to ship goods from points outside the State, store them in their warehouses and afterwards send salesmen out over the State of Texas to sell these goods, and after sale is made, the goods are shipped from the warehouses in Texas to the purchaser who also resides in Texas in the original unbroken package, and by reason of that fact, be exempt from the payment of the tax. Almost three-fourths of appellants' sales had been made before the goods were shipped to Texas and thus they have escaped payment on almost three-fourths of the sales that they have made in Texas. Appellants' competitors who do business only in Texas are required to pay the tax on each sale made, and they cannot raise the question that appellants raise in this case. It follows that if the law as it is being applied is discriminatory at all, the discrimination is against the citizens of Texas, and in favor of appellants who are citizens of the States of Maryland and New York.

Meyer vs. Wells Fargo & Company, 223 *U. S.,* 299.

Appellants also rely on the above case. In this case, the court had before it the constitutionality of an act of the Oklahoma Legislature. Mr. Justice Holmes, who delivered the opinion of the court, stated that Section 2 of the Act provided that:

> "'Every corporation hereinafter named shall pay the State a gross revenue tax * * * which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation equal to the per centum of the gross receipts hereinafter provided, if such public service corporation operate wholly within the State, and if such public service corporation operates partly within and partly without the State, it shall pay a tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the State bears to the whole of its business'; with a proviso for fixing a different proportion if it 'more fairly represents the proportion which the

gross receipts of any such public service corporation for any year within this State bear to its total gross receipts.'"

And that by Section 3, it was provided that:

"The per centum to be paid by express companies (such as the plaintiff is), is three per cent of the gross receipts, and, 'for the purpose of determining the amount of such tax,' they are required to report under oath the gross receipts 'from every souce whatsoever.'"

Continuing, Mr. Justice Holmes said:

"The plaintiff's receipts are largely from commerce among the States, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. Fargo vs. Hart, 193 U. S., 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside. But we see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas, 210 U. S., 217, as to show that, if one is not copied from the other, they have a common source. It would be possibly only by some extraordinary turn of ingenuity to sustain this after condemning that." (Exact pages 299-300.)

It will be observed that the Oklahoma law was almost identical with the Texas law held bad in Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas, supra, and was so considered by this court.

We think that there is a distinction that can be fairly drawn

between the Oklahoma law and the Texas law held bad on the one side and the law of Texas now under attack on the other side, and that there is not only a distinction, but a material difference between these laws, a difference based on fundamental principles.

The Oklahoma law and the Texas law of 1905 taxed both interstate and intrastate business, and the tax was levied in such a way that the interstate and intrastate business could not be separated, and in both the Oklahoma case and the Texas case under the law of 1905, the State officers were asserting the right to tax interstate commerce. Article 7377 now under attack does not attempt to tax interstate commerce, but by the language used, clearly indicates an intention not to tax interstate commerce and the law has been construed by the officers whose duties it is to enforce the same, not to impose a tax on interstate commerce and no attempt is being made by the officers of Texas to collect a tax on interstate commerce. It is true that the occupation tax imposed by the law under attack is in addition to the ad valorem tax, but the law is not bad for that reason. Constitution of Texas, Art. 8, Secs. 1, 2 and 17; Blessing vs. Galveston, 42 Texas, 660; State vs. Stephens, 4 Texas, 137; Albrecht vs. State, 8 Texas Crim. App., 217; State vs. G., H. & S. R. Ry. Co., 100 Texas, 153; so long as it does not discriminate between citizens of Texas and citizens of other States engaged in the same business.

United States Express Company vs. Minnesota, 223 *U. S.*, 335.

Appellants also rely on the above case. This case holds that the law taxing express companies on their property employed within the State 6 per cent of its gross receipts in lieu of all other taxes, is an exercise in good faith of legitimate taxing power and is not an unconstitutional burden upon interstate commerce. We do not think this case supports the contentions of appellants. In fact, it does not seem to be in point on the question now before this court.

Crew Levick Company vs. Pennsylvania, 245 *U. S.*, 292.

Appellants also rely on the above case. We do not think this

case is in point. The State of Pennsylvania imposed a tax upon each wholesale dealer in goods, wares and merchandise, an annual license tax of $3, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually." Crew Levick Company sold merchandise to the value of $47,000 to purchasers within the State of Pennsylvania, and to the amount of about $470,000 to customers in foreign countries. Mr. Justice Pitney said: "That portion of the tax which is measured by the receipts from foreign commerce, necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

We do not believe that any of the cases relied upon by appellants are authority for holding that the law of Texas now under attack amounts to an attempt on the part of the State of Texas to regulate commerce among the States.

2. THE APPELLANTS HAVE ADMITTED AND NOW ADMIT THAT THE STATE OF TEXAS CANNOT REQUIRE APPELLANTS TO PAY THE TAX ON SALES MADE IN TEXAS, WHEN THE GOODS WERE NOT IN TEXAS AT THE TIME THE SALE WAS MADE, BUT ARE AFTERWARDS SHIPPED BY APPELLANTS FROM OUTSIDE THE STATE DIRECT TO THE PURCHASER. IT IS ALSO ADMITTED THAT TEXAS CANNOT COLLECT THE TAX ON SALES MADE BY APPELLANTS OUTSIDE OF TEXAS, IF THE GOODS WERE IN TEXAS AT THE TIME THE SALE WAS MADE AND AFTERWARDS WERE SHIPPED FROM THE WAREHOUSE IN TEXAS TO THE PURCHASER AT A POINT OUTSIDE THE STATE OF TEXAS.

We call attention to the statement made on page 24 of appellants' brief that on April 1, 1919, appellants' attorneys addressed a letter to the State Revenue Agent (whose duties have been taken over by the Comptroller, one of the appellees in this case), and that in reply to this letter the then Comptroller advised that appellants would be required to pay a 2 per cent tax at the end of

each quarter "upon any and all sales made within this State." The then Comptroller wrote this letter before the institution of this suit. After the suit was instituted, the Attorney General of Texas (who is made by law the legal adviser and attorney for the heads of all State departments, including the Comptroller of Public Accounts) admitted in his trial brief and in open court on the hearing for temporary injunction that the State would not insist and was not entitled under the law to collect the tax except on sales made "within this State" when the goods were in the State at the time the sale was made.

Our position was clearly understood by the judges who refused the temporary injunction for, in their opinion, it was said:

> "But as the State officers charged with the enforcement of the act do not construe the act as applying to interstate business, and as they deny that they have any intention of attempting to collect any tax on the receipts of the interstate business of plaintiffs, we can see no necessity to grant the temporary injunction as to the tax on their interstate business. We cannot give our assent to the proposition advanced by plaintiffs that administrative officers of a State may be restrained by temporary injunction from doing an act in pursuance of a legislative enactment which is unconstitutional and void, and which they themselves recognize as invalid, and which they make no threat and express no intention to enforce." **(R. 25.)**

The stipulation as to the facts made in this case by the attorneys for the respective parties was that the Attorney General and the Comptroller are not insisting on the payment of any tax for sales made in Texas when the goods were not in Texas at the time the sale was made. (R. 52 et seq.) This stipulation was that appellants have sold goods in Texas to the amount of $860,801.50. That the State of Texas is only insisting on the payment of taxes on sales to the amount of $233,773.94, this latter amount being the amount appellants admit they have sold "within the State" after the goods had been brought by them to Texas and stored in their warehouses at Dallas or San Antonio. This leaves $627,-

027.56 upon which no tax is asked by the State of Texas, because the goods were sold "within the State" at a time when the goods were not in the State, but were afterwards shipped to the State and direct to the purchaser by appellants from States other than Texas.

3. WHEN PROPERTY IS ACTUALLY IN TRANSIT FROM ONE STATE TO ANOTHER, IT IS THE SUBJECT OF INTERSTATE COMMERCE AND IS EXEMPT FROM STATE TAXATION, BUT AFTER THE PROPERTY HAS REACHED ITS DESTINATION AND IS HELD IN A WAREHOUSE AWAITING SALE, IT IS NO LONGER INTERSTATE COMMERCE AND IS SUBJECT TO STATE TAXATION. KELLY VS. RHOADS, 188 U. S., 1; PITTSBURG COAL CO. VS. BATES, 156 U. S., 577; AMERICAN STEEL AND WIRE CO. VS. SPEED, 192 U. S., 519; GENERAL OIL CO. VS. CRAIN, 209 U. S., 211.

Appellants brought the goods into Texas from another State and stored them in warehouses in Dallas or San Antonio. Thereafter, the agents or salesmen of appellants would go about over Texas and take orders for the goods then in storage in the warehouses in Texas. These orders so taken would be filled by direct shipment from the warehouses at Dallas or San Antonio, and the goods would be delivered to the purchaser in the original unbroken package in which they were brought into the State.

4. WHEN APPELLANTS BROUGHT THEIR GOODS INTO TEXAS AND STORED THEM IN THEIR WAREHOUSES, THE GOODS HAD COME TO REST AND HAD ACQUIRED A SITUS IN TEXAS, AND WHEN THEY WERE AFTERWARDS SOLD BY THE AGENTS OF APPELLANTS TO PURCHASERS IN TEXAS, APPELLANTS WERE LIABLE FOR THE TAX IMPOSED BY ARTICLE 7377 REVISED CIVIL STATUTES OF TEXAS, EVEN THOUGH THE GOODS WERE DELIVERED TO THE PURCHASER IN THE ORIGINAL UNBROKEN PACKAGE

THAT THEY WERE IN WHEN FIRST BROUGHT INTO THE STATE.

We now respectfully direct the attention of the court to that line of decisions holding that goods brought into a State from another State and afterwards sold by the persons who brought them into the State or by the agent of such person in the original unbroken package are subject to the State property tax and in addition the person engaged in selling the goods in the original unbroken package is also subject to pay an occupation tax in like manner as the person selling goods manufactured in the State.

Woodruff vs. Parham, 8 *Wall.*, 123.

After the decision in Brown vs. Maryland, 12 Wheat., 419, which declared an act of the Legislature of the State of Maryland requiring all importers of foreign articles or commodities, before they could sell such articles or commodities, to take out a license for which they were required to pay $50 to be unconstitutional, many people seem to have been under the impression that goods brought into one State of the Union from another State were "imported" goods and not subject to taxation of any kind by the State into which they were brought, so long as the goods remained in the original unbroken package. Woodruff vs. Parham, supra, seems to be the first case decided by this court where a State, or a political subdivision of a State, had insisted that it had the right to require persons selling goods brought into the State in the original unbroken package to pay a license or occupation tax. The Woodruff case was not decided until more than forty years after the decision in Brown vs. Maryland.

The facts in the Woodruff case as given in the opinion, are as follows:

"The city of Mobile, Alabama, in accordance with the provisions in its charter, authorized the collection of a tax for municipal purposes on real and personal estate, sales at auction, and sales of merchandise, capital employed in business and income within the city. This ordinance being on the city statute book,

Woodruff and others, auctioneers, received, in the course of their business for themselves, or as consignees and agents for others, large amounts of goods and merchandise, *the product of States other than Alabama, and sold the same in Mobile to purchasers in the original and unbroken packages.* Thereupon, the tax collector for the city demanded the tax levied by the ordinance." (The court used the Italics.) Woodruff refused to pay the tax, asserting that it was repugnant to certain provisions of the United States Constitution.

It will be observed that the question before this court in the Woodruff case is identical with the question now before this court; that is, the city of Mobile, Alabama, imposed an occupation or license tax on all "sales at auction." The State of Texas imposes an occupation tax on "all sales made within this State" of by-products of petroleum by wholesale dealers in such products. In the Woodruff case, the goods sold at auction "were the products of States other than Alabama" and Woodruff "sold the same in Mobile to purchasers in the original and unbroken packages." In the present case, plaintiffs have received the products of States other than Texas, stored the same in their warehouse in Dallas, Texas, and, after the goods were received in Dallas and stored in the warehouse, sold the same in Texas and delivery was made to the purchasers in the original and unbroken package.

This court held the ordinance of the city of Mobile, Alabama, constitutional, and in doing so, distinguished it from the Maryland tax held bad in Brown vs. Maryland.

The reasoning upon which the court based its conclusion that the rule announced in the Brown case did not apply to an occupation or license tax imposed by a State on a person selling goods brought from another State and sold in the original unbroken package, is on pages 130 to 137, inclusive.

On pages 136 and 137, the court said:

> "Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adop-

tion, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one State to tax articles brought into it from another.

"If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchases in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

"These case sare merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of Brown vs. Maryland, *the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.*" [Italics ours.]

The illustrations made by Mr. Justice Miller apply with equal force to this case. If appellants are not required to pay the tax on sales made by them in the State of Texas in the original unbroken package after the goods had come to rest in Texas the "grossest injustice must prevail and equality of public burdens * * * is impossible." If appellants prevail, they can maintain their business in Texas, derive profits therefrom, be protected in life, liberty and property at the expense of the State of Texas, and not bear what is manifestly their fair share of the expense of such protection. In addition to this, appellants would manifestly be given a great advantage over the citizen of Texas en-

gaged in the same business, for the reason that citizens of Texas engaged in the same business as appellants must pay to the State 2 per cent of the gross receipts received by them from sales made in Texas. Appellants being exempt from this tax could either undersell the citizens of Texas and thus secure a larger volume of business, and probably all the business, or, if they sold at the same price as the citizens of Texas, their profits, if operating expenses be the same, would be greater than that received by the Texas citizen by the amount of the tax, that is, 2 per cent of the total sales.

Appellants have brought goods to Texas and "afterwards sold them within this State" to the amount of $233,733.94. The tax on these sales amounts to $4675.47. Appellants only offered to pay the tax on sales made by them in broken packages, amounting to $16,549.84, the tax on this amount being $330.99. (R. 53.)

If a citizen of Texas has made sales for the same amount, he must pay to the State in taxes $4344.56 more than appellants (who is his competitor) are required to pay according to their contentions. In the Woodruff case, the court, in conclusion, said:

> "But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?
>
> "*The case before us is a simple tax on sales of merchandise imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the right of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabara.* But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void. There is also, in addition to the restraints which those provisions imposed by their own force on the States, the unques-

> tioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another." (Exact page 140.) [Italics ours.]

That part of the quotation from the opinion of the court set out in italics states our case exactly. Article 7377 imposes "a simple tax on sales" of the merchandise described in the law. The tax is "imposed alike upon all sales made in" Texas, "whether the sales be made by a citizen of" Texas, "or of another State, and whether the goods sold are the produce of that State, or some other. There is no attempt to discriminate injuriously against the products of other States or the right of their citizens, and" Article 7377 "is not therefore an attempt to fetter commerce among the States or to deprive the citizens of other States of any privilege or immunity assessed upon citizens of" Texas.

Howe Machine Company vs. Gage, 100 *U. S.*, 176.

The State of Tennessee, by statute, provided that "all peddlers of sewing machines and selling by sample" must pay a tax of ten dollars. Howe Machine Company was a corporation of the State of Connecticut. It manufactured sewing machines at Bridgeport, Connecticut, and had an agency at Nashville in the State of Tennessee. From Nashville, an agent was sent into Sumner County to sell machines there. A tax was demanded from him for a peddler's license to make such sales. He paid the tax under protest. The company then brought suit to recover the tax paid. The company lost in the trial court and the judgment of the trial court was affirmed by the Supreme Court of Tennessee. By writ of error to the Supreme Court of Tennessee, the case was brought to the Supreme Court of the United States. This court held the statute in question constitutional, and affirmed the judgment of the Supreme Court of Tennessee. In the opinion, it is said:

> "In all cases of this class to which the one before us be-

longs, it is a test question whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is, such discrimination is fatal. Other considerations may lead to the same result.

"In the case before us, the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. Woodruff vs. Parham, Hinson vs. Lott, Ward vs. State of Maryland, Welton vs. State of Missouri, supra."

Emert vs. Missouri, 156 *U. S.,* 296.

In the above case, a man by the name of Emert was the agent of the Singer Manufacturing Company which was a corporation under the laws of the State of New Jersey. Emert was, by information, charged with pursuing the occupation of a peddler in the State of Missouri, by going from place to place in a spring wagon with one horse, and did unlawfully sell one sewing machine to David Portucheck, without then and there having a license as a peddler, or any other legal authority to sell the same. He was arrested, tried and convicted. The judgment of conviction was affirmed by the Supreme Court of Missouri. The case, by writ of error, reached the Supreme Court of the United States and this court in affirming the judgment of the Supreme Court of Missouri, said:

"The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was

engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce."

Brown vs. Houston, 114 *U. S.*, 622.

In the above case, coal was brought in flatboats from Fittsburg to New Orleans, was still afloat in the Mississippi river after its arrival, in the same boats, and in the same condition in which it had been brought, and was held in order to be sold on account of the original owners by the boatload; that is to say, it was to be sold in Louisiana in exactly the same condition in which it left the State of Pennsylvania. The Supreme Court of the United States unanimously decided that a tax imposed by general statutes of the State of Louisiana upon this coal was valid; and, speaking by Mr. Justice Bradley, said:

"When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testifies to the same thing, and adds that it was to be sold by the flatboat loads.

"It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. *The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.*

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale.

Take the city of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the products of New York, and goods the products of other States. Of course, the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

Wagner vs. City of Covington, 251 *U. S.*, 95.

The facts in the above case may be briefly stated as follows:

The city of Covington, Kentucky, by ordinance, required all persons carrying on certain specified businesses in the city to take out licenses and pay license fees; among others, the business of wholesale dealer, in what are known as "soft drinks." W. T. Wagner & Sons, a partnership, were manufacturers of soft drinks, having their factory in the city of Cincinnati, Ohio, on the opposite side of the Ohio river from the city of Covington, Kentucky. They sold soft drinks, the product of their manufacture, in Covington, Kentucky. The sales were made in the following manner:

A wagon would be loaded at the factory in Cincinnati and sent across the river to Covington. The driver would make the sale after he reached Covington with the soft drinks. After the sale had been made, the driver would deliver to the purchaser the soft drinks in stopped bottles or siphons, and these were placed (at the factory in Ohio) in separate wooden or metal cases. In stating the facts, Mr. Justice Pitney said:

> "The filled bottles or siphons are carried upon the vehicle, sold, and delivered in these cases, *each case remaining entire and unbroken, and nothing less than a case being sold or delivered.* * * * The ordinances were and are, respectively, applicable to all wholesale dealers in such soft drinks in Covington, whether the goods were or are manufactured within or without the State." (Exact page 100.) [Italics ours.]

This seems to be our case exactly. The city of Covington required wholesale dealers in soft drinks who sold "such soft drinks" in Covington to pay a license fee. The State of Texas requires wholesale dealers in the merchandise described in Article 7377 who sells such merchandise "within this State" to pay an occupation tax.

Wagner brought his goods into Kentucky from outside that State, and after they reached Kentucky his agent sold them in cases, "each case remaining entire and unbroken and nothing less than a case being sold or delivered." In our case, appellants brought their goods to Texas from another State and stored them in warehouses at San Antonio or Dallas. Afterwards, the agents of appellees sold the goods in Texas and delivery was made to the purchaser "in the original unbroken package." The ordinance of the city of Covington was upheld. Mr. Justice Pitney, who delivered the opinion of the court, said:

> "We have, then, a State tax upon the business of an itinerant vender of goods as carried on within the State, a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other States. It is settled by repeated decisions of this court that a license regulation or

tax of this nature, imposed by a State with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the State, and does not conflict with the "commerce clause." Woodruff vs. Parham, 8 Wall., 123, 140; Machine Co. vs. Gage, 100 U. S., 676; Emert vs. Missouri, 156 U. S., 296; Baccus vs. Louisiana, 232 U. S., 334.

"The peddler's license tax considered in Welton vs. Missouri, 91 U. S., 275, was denounced only because it amounted to a discrimination against the products of other States, and therefore to an interference with commerce among the States. To the same effect, Walling vs. Michigan, 116 U. S., 446, 454.

"Of course, the transportation of plaintiffs' goods across the State line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not.

"The distinction between State regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized. In Robbins vs. Shelby County Taxing District, 120 U. S., 489, Mr. Justice Bradley, who spoke for the court said (p. 497):

" 'When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. Brown vs. Houston, 114 U. S., 622; Machine Co. vs. Gage, 100 U. S., 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State,

is a very different thing, and seems to us clearly a tax on interstate commerce.'

"See, also, Crenshaw vs. Arkansas, 227 U. S., 389, 399-400, where the distinction was clearly set forth. And in all the 'drummer cases' the fact has appeared that there was no selling from a stock of goods carried for the purpose, but only a solicitation of sales, with or without the exhibition of samples; the goods sold to be thereafter transported from without the State." (Exact pages 102, 103.)

As previously pointed out, the officers of Texas charged with the enforcement of the law under attack, have construed the law as not applying to sales made by the salesmen or drummers of appellants before the goods reached Texas, and the goods, after the sale was made, were shipped from a point outside of Texas to the purchaser. The construction given the law by the State officers charged with its enforcement will no doubt be followed by this court, especially in this case, where appellants are seeking an injunction against the Attorney General and Comptroller of Public Accounts of Texas, and these officers come into court and state they are not seeking to compel appellants to pay the tax on any sales except those made in Texas after the goods had reached Texas.

Appellants are correct when they say, beginning with the last paragraph on page 3 of their brief, that "the only question brought before this court is whether, without infringing Section 8, Article 1, of the Federal Constitution, and Section 1 of the Fourteenth Amendment thereof, the State may collect a tax equal to 2 per cent of the gross receipts and amount uncollected from sales made by Sonneborn Brothers in Texas of goods brought by them into Texas from other States which they temporarily held in their warehouses in Texas," and afterwards sold and delivered to purchasers in Texas in the original unbroken package. On sound principles of law, based on common justice and upon former decisions of this court, relied on by appellants and appellees, it seems that this court must answer the only question presented by this case against appellants' contentions and in favor of the

State, and affirm the judgment of the lower court denying appellants an injunction.

Respectfully submitted,

C. M. CURETON,
Attorney General of Texas.
C. W. TAYLOR,
E. F. SMITH,
Assistant Attorneys General of Texas,
Solicitors for Appellees.

SONNEBORN BROTHERS *v.* CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 20. Argued March 24, 1922; restored to docket for reargument May 29, 1922; reargued October 5, 1922.—Decided June 11, 1923.

1. A state occupation tax, levied on all wholesale dealers in oil and measured by a per cent. of the gross amount of their respective sales made within the State, is not invalid, as a burden on interstate commerce, when applied to local sales in the original packages, of oil previously shipped into the State and stored by the dealer as part of his stock in trade. P. 508.
2. As regards immunity from state taxation, the distinction between imports and articles in original packages in interstate commerce, is that, in the one case, the immunity attaches to the import itself before sale, while, in the other, it depends on whether the tax regulates or burdens interstate commerce. P. 509.

Woodruff v. *Parham*, 8 Wall. 123, followed. *Standard Oil Co.* v. *Graves*, 249 U. S. 389; *Askren* v. *Continental Oil Co.*, 252 U. S. 444; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, and *Texas Co.* v. *Brown*, 258 U. S. 466, qualified

Affirmed.

APPEAL from a decree of the District Court dismissing, on final hearing, the appellants' bill, which sought to enjoin the enforcement of penalties for failure to make reports of sales of oil and for failure to pay a state tax, in respect

of oil sold in the packages in which it had been originally shipped into the State.

Mr. Joseph Manson McCormick, with whom *Mr. Francis Marion Etheridge* was on the briefs, for appellants.

Mr. E. F. Smith, with whom *Mr. C. M. Cureton,* Attorney General of the State of Texas, and *Mr. C. W. Taylor* were on the brief, for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal from a decree of a United States District Court under § 238, Judicial Code, in a case in which a law of Texas is claimed to be in contravention of the Constitution of the United States. The law in question is Art. 7377 of the Revised Civil Statutes of Texas, approved May 16, 1907, Acts of 1907, p. 479. It provides that every individual, firm or corporation, foreign or domestic, engaging as a wholesale dealer in coal oil or other oils refined from petroleum, shall make a quarterly report to the State Comptroller, showing the gross amount collected and uncollected from any and all sales made within the State during the quarter next preceding, and that an occupation tax shall be paid by such dealer equal to two per cent. of the gross amount of such sales collected or uncollected.

From an agreed statement of facts, the following appears:

Sonneborn Brothers is a firm of non-resident merchants selling petroleum products, with its principal place of business in New York City. In January, 1910, it opened an office in Dallas, Texas, and since that time has maintained it and connecting warerooms and has rented space in a public warehouse at San Antonio, Texas. From January, 1910, until April 11, 1919, receipts from its total

sales, made through orders received at the Dallas office, have amounted to $860,801.50. This sum included:

(1) Those from the sale of oil which, when sold, was not in Texas.

(2) Those from sales of oil to be delivered from Texas out of the State.

(3) Those arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in unbroken original packages.

(4) Those from sales in Texas from broken packages.

The receipts from the first two classes amounted to $643,622.40 and the state authorities made no effort to tax them. The receipts from (4) amounted in the period named to $16,549.84, and appellants do not deny their liability for the tax thereon. The sales made under (3) of unbroken packages, after their arrival in Texas, and after storage in the warerooms or warehouse of appellants, amounted to $217,179.10, and the tax on this amounting to $4,674.58 is the subject of the contest here.

The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.

Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil

as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject.

This has been established so far as property taxes on the merchandise are concerned by a formidable line of authorities. *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517; *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 520; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Bacon* v. *Illinois*, 227 U. S. 504.

But the argument is that for articles in original packages, the sale is a final step in the interstate commerce, and that the owner may not be taxed upon such sale because this is a direct burden on that step. The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the State. This immunity of imports was established by this Court in *Brown* v. *Maryland*, 12 Wheat. 419, 446, 447, and was declared in obedience to the prohibition of the Constitution contained in § 10, Article I, par. 2, providing that:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the State may not tax it. This immunity has been enforced as against

a license or occupation tax on the importer in *Brown* v. *Maryland*, 12 Wheat. 419, as against a personal property tax on a stock of wines of a wine dealer to the extent to which the stock included imported wines in the original packages, *Low* v. *Austin*, 13 Wall. 29, and as against an occupation tax on an auctioneer measured by his commissions on the sales of such imports, *Cook* v. *Pennsylvania*, 97 U. S. 566. When, however, the article imported is sold or is taken from the original packages and exposed for sale, the immunity is gone. *Waring* v. *The Mayor*, 8 Wall. 110; *May* v. *New Orleans*, 178 U. S. 496.

Cases subsequent to *Brown* v. *Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce.

The first of the cases making this distinction is *Woodruff* v. *Parham*, 8 Wall. 123. In that case, Woodruff, an auctioneer in Mobile, received, in the course of his general business for himself and as consignee and agent for others, merchandise from Alabama and from other States and sold it in unbroken packages. The City of Mobile under its charter levied a uniform tax on real and personal property, on sales at auction, on sales of merchandise, and on capital employed in the business in the city. Woodruff objected to paying any tax on the auction sales of merchandise from other States in original packages. The question most considered by the Court was whether merchandise exported from one State to another was an export which a State was forbidden to tax by Article I, § 10, par. 2, of the Federal Constitution, above quoted. It was held that it was not, and that the words "imports and exports" as there used referred to, and included only mer-

chandise brought in from, or transported to, foreign countries. The Court (p. 140) further held that such a tax which did not discriminate against the sales of goods from other States, but was imposed upon sales of all merchandise, whether its origin was in Alabama or in any other State, was not "an attempt to fetter commerce among the States."

At the close of the opinion in *Brown* v. *Maryland*, Chief Justice Marshall made the remark "that we suppose the principles laid down in this case apply equally to importations from a sister State." This was pronounced in *Woodruff* v. *Parham* not to be a judicial decision of the question but an *obiter dictum*.

While the opinion by Mr. Justice Miller in *Woodruff* v. *Parham* is chiefly devoted to showing that exports are limited to goods sent out of the country, the decision on the interstate commerce phase of the issue was most fully considered. The adverse view was pressed with all the learning and force of argument of John A. Campbell, formerly a Justice of this Court.

Immediately following *Woodruff* v. *Parham* is *Hinson* v. *Lott*, 8 Wall. 148, in which was at issue the validity of a provision of the Alabama law that before it should be lawful for a dealer introducing spirituous liquors into the State to offer the same for sale, he must pay fifty cents a gallon thereon. The provision was sustained as not being an attempt to burden interstate commerce, because by another section of the same law every distiller of the State was required to pay fifty cents a gallon on all liquor made by him, and the two sections were complementary in order "to make the tax equal on all liquors sold in the State."

Woodruff v. *Parham* was affirmed and applied in *Brown* v. *Houston*, 114 U. S. 622, where coal mined in Pennsylvania and sent in barges to New Orleans to be sold after arrival from those barges, without being landed, to a

vessel bound to a foreign port was held while awaiting sale to be subject to taxation by the State as property in Louisiana.

The case of *Woodruff* v. *Parham* has never been overruled but has often been approved and followed as the cases above cited show. As an authority it controls the case before us and shows conclusively that the tax in question is valid.

The distinction between the immunity from state taxation of imports in original packages, and that of articles coming from interstate commerce in original packages, is again brought out with emphasis by Mr. Justice White, afterwards Chief Justice, in *American Steel & Wire Co.* v. *Speed,* 192 U. S. 522. In that case, articles of hardware were shipped by the American Steel & Wire Company from their factories in the East to Memphis, Tennessee, and there kept in store in original packages to be distributed to Arkansas and other States when sold, on orders to be subsequently secured. Memphis, under a general law, imposed a merchant's tax on the Wire Company, based on the average capital invested in the business and included this stock of original packages in the average. The Court conceded that if these goods were "imports," they could not be taxed under *Brown* v. *Maryland,* but said (p. 519):

"But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the State for sale," and cited the cases of *Woodruff* v. *Parham,* and *Brown* v. *Houston.* Speaking of these cases, the Justice said:

"Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two

cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the States of the Union."

Support for the contention that a state tax on sales of merchandise in original packages brought in from another State is to be distinguished from *ad valorem* taxes on the merchandise itself is supposed to be found in the cases of *Leisy* v. *Hardin*, 135 U. S. 100, and *Lyng* v. *Michigan*, 135 U. S. 161. In those cases it was held that a law of a State which forbade sales of merchandise brought into the State from another State and subjected it to forfeiture, was invalid because freedom to sell was part of interstate commerce and interference with such freedom was an obstruction and would be so regarded as long as the merchandise was unsold and in an original package. The reasoning in *Brown* v. *Maryland* as to the necessity of sale to complete importation was resorted to by the Court in *Leisy* v. *Hardin* to sustain the view that a sale was a part of interstate commerce and any state action which intercepted the merchandise brought in before sale in the original package was void. In drawing the proper line between the valid operation of state prohibition laws and lawful interstate commerce, Chief Justice Marshall's conception of that to be drawn between importation from abroad under the Constitution and state taxation was adopted. Without questioning the reasoning used to reach the conclusion in *Leisy* v. *Hardin*, it is enough to point out the radical difference between state legislation preventing any sale at all accompanied by forfeiture of the merchandise, and a provision for an occupation tax applicable to all sales of such merchandise whether domestic or brought from another State. The one plainly interferes with or destroys the commerce, the other merely puts the merchandise on an equality with all other merchandise in the State and constitutes no real hindrance to introducing the merchandise into the State for sale

upon the basis of equal competition. Mr. Justice White in his opinion in *American Steel & Wire Co.* v. *Speed*, thus distinguished *Leisy* v. *Hardin* from the case then before the Court. The obstruction to interstate commerce in *Leisy* v. *Hardin* was like that in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 12, in *Railroad Co.* v. *Husen*, 95 U. S. 465, 469, in *Minnesota* v. *Barber*, 136 U. S. 313, in *Brimmer* v. *Rebman*, 138 U. S. 78, in *Scott* v. *Donald*, 165 U. S. 58, 97, in *Vance* v. *Vandercook Co., No. 1*, 170 U. S. 438, and in *American Express Co.* v. *Iowa*, 196 U. S. 133.

Counsel for the appellants cite the case of *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, as aiding their argument that a tax on a sale of merchandise in an original package brought from another State is a tax on interstate commerce and is different from an *ad valorem* property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a State to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky to be delivered at a railway station in Kentucky for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that State might nevertheless make and enforce without incurring the penalty of the state law. It was said in that case (p. 290) that,

"Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland*, 12 Wheat. 419, 446–447; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another, the

commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa,* 196 U. S. 133, 143."

But this language has no relevancy to show that a tax without discrimination on goods after the transportation ceases, is a burden on interstate commerce, a proposition negatived in the *American Steel & Wire Co. Case* it cites, or that a different rule should apply to an *ad valorem* property tax from that in case of a tax on sales.

Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it. *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Asher* v. *Texas,* 128 U. S. 129; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 147; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Brennan* v. *Titusville,* 153 U. S. 289; *Dozier* v. *Alabama,* 218 U. S. 124; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Stewart* v. *Michigan,* 232 U. S. 665; *Western Oil Refining Co.* v. *Lipscomb,* 244 U. S. 346.

So too a tax upon the gross receipts from interstate transportation or transmission, whether receipts from intrastate transportation or transmission are equally taxed or not, is an unlawful tax because a direct burden upon interstate commerce. *State Freight Tax,* 15 Wall. 232, 276, 277; *Fargo* v. *Michigan,* 121 U. S. 230, 244; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 336; *Leloup* v. *Port of Mobile,* 127 U. S. 640, 648; *McCall* v. *California,* 136 U. S. 104, 109; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, 227; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

A state tax upon merchandise brought in from another State or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State. This distinction is illustrated in the difference between those cases which uphold the validity of a tax upon peddlers engaged in selling merchandise from out of the State which they carry with them, like those of *Machine Co.* v. *Gage*, 100 U. S. 676, *Emert* v. *Missouri*, 156 U. S. 296, *Baccus* v. *Louisiana*, 232 U. S. 334, and *Wagner* v. *Covington*, 251 U. S. 95, on the one hand, and that of *Welton* v. *Missouri*, 91 U. S. 275, in which a peddler's tax was held bad because it was levied only on goods from other States, on the other. *Ward* v. *Maryland*, 12 Wall. 418, 429, *Guy* v. *Baltimore*, 100 U. S. 434, 442–443, *Tiernan* v. *Rinker*, 102 U. S. 123, *Webber* v. *Virginia*, 103 U. S. 344, 350, and *Walling* v. *Michigan*, 116 U. S. 446, are other instances showing the invalidity of state tax laws discriminating against merchandise brought in from other States.

Appellants' chief argument to sustain their contention that a sale of merchandise in the original package made after it is brought into the State from another State is exempt from state taxation is based upon the language of the opinions in certain recent cases in this Court. They are *Standard Oil Co.* v. *Graves*, 249 U. S. 389; *Askren* v. *Continental Oil Co.*, 252 U. S. 444; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, and *Texas Co.* v. *Brown*, 258 U. S. 466.

Standard Oil Co. v. *Graves* was a case of excessive inspection fees. The law of Washington in that case required inspection and labelling before sale, and punished sales without them. The Supreme Court of the State said the law could be sustained as an excise law on selling oil in the State. The opinion contains this passage:

"In this case the amended complaint alleges that the oils were shipped into Washington from California. They are brought there for sale. This right of sale as to such importations is protected to the importer by the Federal Constitution, certainly while the same are in the original receptacles or containers in which they are brought into the State."

The Court said finally:

"We reach the conclusion that the statute imposing these excessive inspection fees, in the manner stated, upon all sales of oils brought into the State in interstate commerce necessarily imposes a direct burden upon such commerce, and is, therefore, violative of the commerce clause of the Federal Constitution."

There is nothing in the statement of the case to show the details of the importations of oil, and nothing to indicate how much, if any, of the oil imported had been ordered before shipment into the State or how much sold after importation. The remark of the Court as to original receptacles or containers, therefore, is not shown to have been necessary to the conclusion.

The case of *Askren* v. *Continental Oil Co.* involved the validity of a law called an inspection law, imposing a license tax upon those selling gasoline in the State, and an excise tax of 2 cents a gallon on the sale or use of it. The inspectors' duties were to see to the execution of the act and the excess of receipts after payment of their salaries and expenses went into the road fund of the State. The case was decided on the averments of the bill which described complainant's business of two kinds, first, that of selling oil to customers in tanks, and also in barrels and packages containing not less than two 5-gallon cans, without breaking them, and, second, of selling gasoline from such tanks and cans in quantities desired by the purchaser. There was nothing to show whether the first kind of business was done on orders lodged before importation or after.

The Court, however, said:

"As to the gasoline brought into the State in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in *Standard Oil Co.* v. *Graves*, 249 U. S. 389, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another State into his own State for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved."

If the orders for such sales in original packages were given before importation, the conclusion reached by the Court that they were protected against an excise or license tax is in accord with all of the cases already cited, though the fact that they were delivered in the original packages would not give them any additional immunity. It should be noted that in this opinion, the case of *Wagner* v. *Covington*, 251 U. S. 95, is quoted approvingly and followed although in that case a tax was upheld on merchandise brought in from Ohio by the seller and sold there in the original packages. In the absence of specification as to when ordered, we can not be sure that the case was wrongly decided, but only that the language used contained implications which can not be sustained.

The case of *Bowman* v. *Continental Oil Co.* was the same case as the *Askren Case*, the representatives of the State having changed. The *Askren Case* had come here on an appeal from an interlocutory injunction and was

decided on the averments of the bill. When the case went back, an answer was filed and the case was heard and it turned out that only five per cent. of the business was in tank cars and unbroken packages sold, and that 95 per cent. was in sales of gasoline in quantities desired. The main point decided in the *Bowman Case* was that a license tax law which imposed a lump tax as a condition of doing business, part of which it was unlawful under the Federal Constitution to tax, must be declared void, though the other part of the business might have been properly the subject of such a tax. As to the excise tax, the Court directed the injunction to issue with respect to the imposition upon "sales of gasoline brought from without the State into the State of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels, or other packages, and in the same form and condition as when received by plaintiff in that State." If this covered gasoline that was ordered by the purchaser before importation, it was right. If it covered gasoline, whether in original packages or not, which was sold after it reached its destination, then it is not in accord with the law as we understand it to be under the authorities we have cited. There is nothing in the case as disclosed in the statements of facts either in the *Askren* or the *Bowman Case* to show what the fact was in this regard.

It is hardly to be supposed that the Court intended in these cases to overrule or narrowly to distinguish the cases of *Woodruff* v. *Parham, Hinson* v. *Lott, Brown* v. *Houston, Pittsburg & Southern Coal Co.* v. *Bates, American Steel & Wire Co.* v. *Speed,* and *Wagner* v. *Covington,* without mentioning them, especially when we find that in *Texas Co.* v. *Brown,* 258 U. S. 466, 476, they are quoted approvingly and followed. That case involved the question whether an inspection law resulting in receipts greatly in excess of the cost of inspection, and construed

by the Georgia Supreme Court to be an excise tax, was valid in its application to oil shipped into Georgia from Texas and stored in Georgia for distribution and sale. It was held to be a valid tax. The case was rightly decided; and for the right reason; but in seeking to distinguish the previous cases, the opinion uses this language:

"Appellant insists that *Standard Oil Co.* v. *Graves*, 249 U. S. 389, is inconsistent with the imposition of inspection fees on a revenue basis upon goods brought from another State, however held or disposed of in Georgia. That decision, however, extended the exemption from such fees of goods brought from State to State, no further than 'while the same are in the original receptacles or containers in which they are brought into the State' (pp. 394–395); and so it was interpreted in *Askren* v. *Continental Oil Co.*, 252 U. S. 444, 449."

Upon full consideration and after a reargument, we can not think this extension of the exemption referred to, if intended to apply to oil sold after arrival in the State, to be justified either in reason or in previous authority, and to this extent the opinions in the cases cited are qualified.

The cases all involved the validity of statutes providing for excessive inspection fees and the question of saving the statute as an excise law applicable to part of the sales of the oil was an incidental one. The facts upon which the line between taxable and non-taxable sales could be correctly drawn do not appear fully in any of the cases, or to have been discussed by counsel. This is what has led to a confusion as to the real distinctions and to observations in the opinions which unless much restricted in their application constitute a departure from theretofore established principles.

In *Woodruff* v. *Parham* (p. 137), Mr. Justice Miller gives an illustration of the injustice which would arise if the constitutional immunity from state taxation as to

imports from abroad were to be held to apply to imports from one State to another. It correctly describes the result if the interstate commerce clause were to afford the same immunity:

"The merchant at Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

This argument is as strong today as when it was written and it would be a source of confusion and injustice if through too broad expressions in a few opinions, a different conclusion from that to which it should carry us, were to obtain.

The decree of the District Court is

Affirmed.

MR. JUSTICE McREYNOLDS, concurring.

I am unable to concur in all said to support the conclusion adopted by the Court. To me the result seems out of harmony with the theory upon which recent opinions proceed. There is unfortunate confusion concerning the general subject and certainly some pronouncement that can abide is desirable.

Apparently no great harm, and possibly some good, will follow a flat declaration that irrespective of analogies and

for purposes of taxation we will hold interstate commerce ends when an original package reaches the consignee and comes to rest within a State, although intended for sale there in unbroken form. It may be said that the effect on interstate commerce is not substantial and too remote, notwithstanding the rather clear logic of *Brown* v. *Maryland*, 12 Wheat. 419, to the contrary and the much discussed theory respecting freedom of interstate commerce from interference by the States, announced and developed long after *Woodruff* v. *Parham* (1868), 8 Wall. 123. Logic and taxation are not always the best of friends.

CHAS. WOLFF PACKING COMPANY v. COURT OF